APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5124

HERCULES INCORPORATED,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

92-5138

WM. T. THOMPSON COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: May 4, 1994

Before PLAGER, CLEVENGER, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

In these consolidated appeals, Hercules Incorporated (Hercules) and Wm. T. Thompson Company (Thomp-

son), respectively, appeal the April 2 and April 22, 1992 judgments of the United States Claims Court.[1] In those judgments, the court dismissed Hercules' and Thompson's complaints after granting the motions of the United States for summary judgment.[2] Hercules and Thompson, who are chemical manufacturers, had sought to recover the sums they contributed to a fund established in connection with the settlement of a district court class action tort suit brought against them and other companies by and on behalf of individuals who were exposed to a defoliant known as "Agent Orange" during the Vietnam War. Hercules and Thompson also had sought to recover the attorney fees and expenses incurred in that litigation.[3]

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[1] The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516, changed the name of the United States Claims Court to the "United States Court of Federal Claims." Unless the context requires otherwise, we refer to the trial court by the name which it had while this matter was pending before it.

[2] *Hercules, Inc. v. United States*, 25 Cl. Ct. 616 (1992); *Wm. T. Thompson Co. v. United States*, 26 Cl. Ct. 17 (1992).

[3] Throughout this opinion, we will cite to the following four district court decisions in what we refer to as the "Agent Orange litigation":

i. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980) (decision certifying Fed. R. Civ. P. 23(b)(3) class of plaintiffs);

ii. *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263 (E.D.N.Y. 1983) (decision granting summary judgment in favor of defendant chemical manufacturers—subsequently reconsidered after the case was transferred to another district judge);

iii. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (decision approving settlement agreement between class action plaintiffs and defendant chemical manufacturers); and

iv. *In re "Agent Oragnge" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985) (decision granting summary judgment in favor of defendant chemical manufacturers against plaintiffs who had opted-out of the class action).

Finding no error in the Claims Court's decisions, we affirm the judgments.

BACKGROUND

The following facts are not in dispute:

A. Historical

In the mid to late 1960s, Hercules and Thompson were members of a group of chemical companies that manufactured Agent Orange for the United States military. Agent Orange is a blend of equal parts of 2,4-Dichlorophenoxyacetic Acid (2,4-D) and 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T), both of which are phenoxy herbicides. *Hercules, Inc. v. United States*, 25 Cl. Ct. 616, 618 (1992). Depending on its method of production, Agent Orange may contain varying amounts of 2,3,7,8 Tetrachlorodibenzo-p-dioxin (dioxin), an extremely toxic substance. *Id.* The military used Agent Orange during the Vietnam War to defoliate large areas of forest so that Viet Cong and North Vietnamese troops could not hide beneath the foliage from view of aircraft. The military mixed the Agent Orange produced by the various chemical companies and stored the mixture in large drums. *Id.* at 619. During the relevant period, the government and the military had considerable knowledge of hazards associated with 2,4,5-T and dioxin. *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263, 1266 (E.D.N.Y. 1983).

Hercules began producing phenoxy herbicides containing 2,4,5-T in 1961. *Hercules*, 25 Cl. Ct. at 619. It produced Agent Orange for the government between May 8, 1964, and May 20, 1968, pursuant to fifteen separate contracts. *Id.* The military supplied the formula and specifications for manufacturing Agent Orange, with which Hercules complied. *Id.* In its complaint in the Claims Court, Hercules alleged that it manufactured and supplied Agent Orange pursuant to the Defense Produc-

tion Act of 1950, 50 U.S.C. app. § 2061-2170 (1964) (hereinafter, DPA).[4] In 1965, Hercules learned of the health risks associated with 2,4,5-T and changed its method of production to eliminate dioxin from its product. *Id.; In re "Agent Orange"*, 565 F. Supp. at 1274. From 1966 to 1970, Hercules' product was not measurably contaminated with dioxin. *Id.*

Thompson produced phenoxy herbicides containing 2,4,5-T and 2,4-D in the 1950s and 1960s. Thompson, however, originally declined to bid on the government's solicitation to chemical manufacturers for the production of Agent Orange. *Wm. T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 20 (1992). In due course, however, the government invoked the DPA and required Thompson to supply Agent Orange pursuant to two contracts dated April 19, 1967, and May 24, 1968. *In re "Agent Orange"*, 565 F. Supp. at 1272. Between September 1967 and January 1969, Thompson supplied Agent Orange to the military. *Id.* There is no evidence that Thompson was aware of the health risks associated with Agent Orange. *Id.* at 1273. As in the case of Hercules, the government provided the formula and specifications for Agent Orange without any input from Thompson.

B. The Agent Orange Litigation

Starting in 1979, numerous tort actions were filed by Vietnam veterans and their families against the various chemical manufacturers who produced Agent Orange for the government, including Hercules and Thompson. The tort actions alleged that the veterans' exposure to dioxin contained in Agent Orange produced by the chemical

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[4] The DPA authorizes the President, *inter alia*, to require acceptance and performance of contracts which he deems necessary or appropriate to promote the national defense in preference to other contracts. 50 U.S.C. app. § 2071. The pertinent parts of the statute are discussed below.

companies had caused various health problems for the plaintiffs, such as cancer, miscarriages, and birth defects. The Judicial Panel on Multi-District Litigation consolidated these tort actions in the United States District Court for the Eastern District of New York, under the heading MDL No. 381. The court certified a class comprising all veterans claiming injuries who had served in or near Vietnam between 1961 and 1972, pursuant to Fed. R. Civ. P. 23(b)(3). The certified class also included the veterans' spouses, parents, and children (born before January 1, 1984) directly or derivatively injured as a result of the veterans' exposure. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 787-92 (E.D.N.Y. 1980). Plaintiffs were allowed to "opt out" of the Rule 23(b)(3) class by May 1, 1984. *Id.* As discussed below, nearly 300 of the plaintiffs opted out.

Hercules and Thompson, along with several other defendant manufacturers, moved for summary judgment in the district court on the ground that, because of their status as government contractors, the government contractor defense shielded them from liability for any injuries to the veterans or their families allegedly caused by exposure to Agent Orange. *In re "Agent Orange"*, 565 F. Supp. at 1265.[5] In a previous pretrial order, the district court had defined the contours of the government contractor defense as follows:

> [A] defendant in this case will be entitled to judgment dismissing all claims against it based on that defendant's having supplied "Agent Orange" to the government pursuant to a contract, if the defendant proves:
>
> 1. That the government established the specifications for "Agent Orange";

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[5] The district court used the term "government contract defense." *Id.*

> 2. That the "Agent Orange" manufactured by the defendant met the government's specifications in all material respects; and
>
> 3. That the government knew as much or more than the defendant about the hazards to people that accompanied use of "Agent Orange."

Id. (quoting *In re "Agent Orange" Prod. Liab.*, 534 F. Supp. 1046, 1055 (E.D.N.Y. 1982)).

On May 20, 1983, the district court granted summary judgment for Hercules and Thompson, along with two other manufacturers of Agent Orange, finding that they met the requirements of the "government contract defense." *Id.* at 1273, 1274. In so ruling, the district court framed the "central issue" as whether the third element of the government contractor defense had been established, i.e., "whether the government knew as much as or more than the contracting defendant about the hazards to people that accompanied the use of 'Agent Orange.'" *Id.* at 1265.

With respect to Hercules, the district court concluded that because its "product was dioxin-free, Hercules had no knowledge of harm from dioxin contamination caused by its product and thus did not know more than the government about hazards associated with the use of its product." *Id.* at 1274.

In Thompson's case, the district court concluded that although the evidence established that Thompson may have had "knowledge of possible health hazards related to the *manufacture* of Agent Orange[, the evidence did not establish] knowledge in Thompson of hazards to *users*." *Id.* at 1273 (emphasis supplied). In contrast, the district court believed that "it [was] clear by 1967, when Thompson first contracted to manufacture Agent Orange, the government had a significant amount of knowledge about dioxin . . . and its association with . . . health problems." *Id.*

Hercules' and Thompson's victory in the district court proved to be short-lived, however. After summary judgment was entered in their favor and in favor of the other two Agent Orange manufacturers—but before a judgment of dismissal was entered—the case was transferred to another judge in the Eastern District of New York. In November of 1983, the transferee judge reconsidered the issue and denied the summary judgment motions of Hercules and Thompson. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 753 (E.D.N.Y. 1984).

On May 7, 1984, the date that trial would have begun in the class action suit, the parties reached a settlement. The settlement called for the creation of a $180 million settlement fund, with each defendant contributing to the fund in proportion to its percentage of the total volume of Agent Orange produced, with a factor for the level of dioxin in the particular manufacturer's product. *In re "Agent Orange"*, 597 F. Supp. at 748. Hercules' share of the settlement was about ten percent, valued at $18,772,568. Thompson's share was around two percent, amounting to $3,096,597. In its opinion approving the settlement, the district court noted that the plaintiffs would have had extreme difficulty proving that their injuries resulted from exposure to dioxin present in the Agent Orange. *In re "Agent Orange"*, 597 F. Supp. at 782.

Upon settlement of the class action, the defendant manufacturers, including Hercules and Thompson, moved for summary judgment against the nearly 300 plaintiffs who had opted-out of the class action suit. These opt-out plaintiffs were those who had voluntarily chosen not to be part of the certified Rule 23(b)(3) class, and who consequently did not share in the $180 million settlement fund. In support of the summary judgment motion, the defendant manufacturers argued that they were entitled to judgment

> because of each plaintiff's conceded inability to identify the individual manufacturer of the Agent Orange

> to which a given veteran was exposed, inapplicability of any alternative theory of liability that would overcome that inability, the government contract defense, and inability of any plaintiff to prove that his or her injuries were caused by Agent Orange.

In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1229 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The district court granted summary judgment for the manufacturers primarily on the ground that the plaintiffs had failed to present credible evidence of a causal link between exposure to Agent Orange and the plaintiffs' alleged injuries. *Id.* at 1259-60. As a secondary basis, the district court held that the defendant companies were insulated from liability by the government contractor defense as it was "clear from the record . . . that the government knew as much as, or more than, the defendant chemical companies about the possible adverse health effects of Agent Orange as it was used in Vietnam." *Id.* at 1263. This secondary ground for summary judgment was identical, of course, to the ground upon which summary judgment had been granted in favor of Hercules and Thompson two years earlier, before the case was transferred.

The United States Court of Appeals for the Second Circuit affirmed both the settlement with the Rule 23(b)(3) class, *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145 (2d Cir. 1987), and the grant of summary judgment in favor of the defendant manufacturers against the opt-out plaintiffs. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The Court of Appeals affirmed the grant of summary judgment against the opt-out plaintiffs solely on the basis of the government contractor defense (referred to as the "military contractor defense" by the Second Circuit), and did not address the other grounds for summary judgment advanced by the district court. *Id.* at 189.

C. The Claims Court Proceedings

In 1990, Hercules and Thompson each brought an action in the Claims Court against the United States, seeking (i) indemnification for their respective contributions to the settlement fund in the 1984 class action settlement, and (ii) legal fees and expenses incurred in the Agent Orange litigation. *Hercules*, 25 Cl. Ct. at 620. The actions were grounded in Hercules' and Thompson's respective contracts with the government for the production of Agent Orange.

Hercules' complaint, filed June 8, 1990, asserted that it was entitled to recover from the government under any one of the following four theories:

1. *Superior Knowledge*—The government allegedly breached an implied-in-fact contractual obligation by withholding from Hercules the government's superior knowledge concerning the unprecedented military use of Agent Orange by the government and the possible health risks attendant with such use.

2. *Good Faith*—The government allegedly breached an implied-in-fact contractual obligation to exercise good faith and not increase Hercules[']' costs by using Agent Orange in Southeast Asia in an unprecedented military manner that failed to avoid potential health risks.

3. *"Reverse" Warranty*—The government allegedly breached an implied-in-fact contractual obligation to exercise due care in using Hercules' Agent Orange. Specifically, Hercules alleged that the government had a duty to use the Agent Orange it purchased from Hercules in a manner reasonably calculated to avoid potential health risks and to take adequate precautions and safeguards or provide identification of active ingredients and adequate warnings and instructions concerning the proper use of and exposure to Agent Orange.

4. *Implied Warranty of Specifications*—The government allegedly breached an implied-in-fact contractual

obligation "to establish specifications and requirements for Agent Orange sufficient to make Agent Orange adequate and suitable for the unprecedented intended and actual military use to which it was put in Southeast Asia.

Under each of its different theories of liability, Hercules alleged that the government's breach of its contractual obligations caused Hercules to sustain increased expenses of performance and incur substantial money damages in connection with the Agent Orange cases and that Hercules was entitled to contractual indemnification therefor.

Thompson's complaint, filed May 7, 1990, and amended October 23, 1990, asserted that it was entitled to recover against the government under any one of three contractual theories, two of which were substantially identical to two of Hercules' theories of liability: superior knowledge by the government, and an implied warranty of specifications. As a third alternative theory of liability, Thompson contended that the goverment breached an implied-in-fact contractual obligation to indemnify Thompson for losses arising from its compelled production of Agent Orange under the DPA.

In each case the government moved to dismiss the complaint, or, in the alternative, for summary judgment as a matter of law. *Hercules*, 25 Cl. Ct. at 620; *Wm. T. Thompson*, 26 Cl. Ct. at 22. The Claims Court granted the government's motions for summary judgment and dismissed both cases. In so ruling, the court held that the superior knowledge doctrine only applied in situations where the government possessed vital knowledge that affected contract "performance costs or duration of performance." *Hercules*, 25 Cl. Ct. at 623; *Wm. T. Thompson*, 26 Cl. Ct. at 24. Because Hercules' and Thompson's increased costs were the result of post-performance litigation and were not connected to contract performance, the Claims Court concluded, the superior knowledge doctrine could not be expanded to encompass their claims. *Id.* Similarly, the Claims Court found that Hercules' good

faith theory could not withstand summary judgment because it was "another performance-related doctrine" that could not be extended to matters occurring "at some distant point in the future" after contract performance. *Hercules*, 25 Cl. Ct. at 623.

With regard to Hercules' reverse warranty argument, the Claims Court held that such an implied-in-fact reverse warranty never arose because the circumstances surrounding the sale of Agent Orange could not support a factual inference that Hercules and the government had "actually come to a meeting of the minds and taken upon themselves [the] corresponding obligations and liabilities" of the alleged reverse warranty. *Hercules*, 25 Cl. Ct. at 624.

Turning to the warranty of specifications theory, the Claims Court held that even assuming that such a warranty arose, the plaintiff-manufacturers had failed to prove "that this warranty was *breached* by the Government and that this breach caused [them] to suffer the type of damages recoverable in contract." *Hercules*, 25 Cl. Ct. at 625-26; *Wm. T. Thompson*, 26 Cl. Ct. at 25. Addressing first the portion of the damages claim which consisted of the payments into the settlement fund, the court set forth two separate reasons that it believed prevented Hercules and Thompson from proving that they were "actually subjected to tort liability by third parties because of [their] manufacture of Agent Orange for the Government's military use." *Hercules*, 25 Cl. Ct. at 626; *Wm. T. Thompson*, 26 Cl. Ct. at 26. "First," the Claims Court stated, "dioxin has never been scientifically proven to cause the injuries that veterans alleged, and second, the [plaintiff-manufacturers were] protected from liability to the veterans in any event under the Government contractor defense. . . ." *Id.*

Regarding the type of damages sought, the Claims Court, citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), and *Northern Helex Co. v. United States*, 524 F.2d 707, 721 (Ct. Cl. 1975), *cert. denied*,

429 U.S. 866 (1976), stated that "it is axiomatic that . . . damages [arising from contract breaches] are limited to those that were reasonably foreseeable at the time the parties formed the contract." *Hercules,* 25 Cl. Ct. at 627-28; *Wm. T. Thompson,* 26 Cl. Ct. at 27-28.

From this proposition, the court reasoned that

> [t]he facts may support an implied warranty of specification, but they cannot be stretched so far as to support the theory that the parties came to a meeting of the minds that there would be an indemnification agreement between them if the implied warranty of specification was alleged, but never proven, to be violated.

Hercules, 25 Cl. Ct. at 627; *Wm. T. Thompson,* 26 Cl. Ct. at 28.

The Claims Court also held that

> there was no breach of the warranty of specification based on the manufacturer's tort liability to third parties supposedly injured by the product because the manufacturer, under the circumstances alleged, was protected from liability by the Government contractor defense.

Hercules, 25 Cl. Ct. at 628; *Wm. T. Thompson,* 26 Cl. Ct. at 28. We read this latter statement as a holding by the Claims Court that, assuming the existence of an implied warranty of specifications, Hercules and Thompson could not establish that the damages which they incurred—their payments into the Agent Orange settlement fund—flowed from a breach of that warranty, because the government contractor defense protected them against those damages and they incurred those damages as a result of their decision to settle the litigation in the face of that protection.

As far as the claims for attorney's fees were concerned, the Claims Court held that Hercules and Thompson could not recover such fees because they represented the kind

of remote and consequential damages not normally awarded in contract cases. *Hercules,* 25 Cl. Ct. at 627-28; *Wm. T. Thompson,* 26 Cl. Ct. at 27-28, both citing *Kania v. United States,* 650 F.2d 264, 269 (Ct. Cl.), *cert. denied,* 454 U.S. 895 (1981).

In the case of Hercules' and Thompson's assertions that they were entitled to contract indemnification, the Claims Court noted that their respective contracts contained no provision expressly providing for indemnification. *Hercules,* 25 Cl. Ct. at 633; *Wm. T. Thompson,* 26 Cl. Ct. at 28. In Thompson's case, the court rejected the contention that an implied-in-fact contract indemnification term arose from section 707 of the DPA,[6] because that section merely "excuses a Government contractor's breach of its other, non-Government contracts which were adversely affected by the priority given to the Government's procurement demands under the DPA." *Wm. T. Thompson,* 26 Cl. Ct. at 29. In addition, in the case of both Hercules and Thompson, the court held that, even assuming that an implied-in-fact contractual obligation to indemnify existed, the provision would be unenforceable as violative of the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988).[7] *Hercules,* 25 Cl. Ct. at 634; *Wm. T. Thompson,* 26 Cl. Ct. at 29.

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[6] In pertinent part, section 707 of the DPA states:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act. . . .

50 U.S.C. app. § 2157 (1964).

[7] In pertinent part, the Anti-Deficiency Act states that officers or employees of the United States may not:

> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341 (1988).

Finally, the Claims Court held that the policies underlying the government contractor defense provided a "separate and independent" basis for denial of all claims against the government by Hercules and Thompson. *Hercules,* 25 Cl. Ct. at 631; *Wm. T. Thompson,* 26 Cl. Ct. at 33.

DISCUSSION

A. Standard of Review

A trial court may award summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); RUSCC 56(c); *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987). In reviewing a grant of summary judgment by the trial court, we determine for ourselves whether the standards for summary judgment have been met and we are not bound by the trial court's ruling that there are no genuine issues of material fact in the case. *Id.*

B. Appellants' Contentions

On appeal, Hercules contends that because disputed issues of material fact exist, the Claims Court committed reversible error by granting summary judgment with respect to its contractual claims based upon the theories of superior knowledge, reverse warranty, and an implied warranty of specifications. Thompson also contends that the existence of disputed material facts precluded summary judgment with respect to its contractual claims based upon the theories of superior knowledge and an implied warranty of specifications. Thompson further contends that the Claims Court erred as a matter of law in holding (i) that an implied-in-fact contractual obligation for indemnity did not arise under the DPA, and (ii) that such a term—assuming it did arise—would be barred by the Anti-Deficiency Act. Lastly, both Hercules and Thompson contend that the Claims Court erred in holding

that the government contractor defense provided a "separate and independent" basis for denial of their claims.

We have carefully considered all of appellants' arguments on appeal. Having found no errors of law, nor any genuine issues of material fact, we conclude that the Claims Court correctly decided each of the contract based claims asserted by Hercules and Thompson. We affirm the judgments of the Claims Court on that basis and do not reach the issue of whether the government contractor defense would provide a "separate and independent" basis for the court's decision. As will be seen, however, the presence of the government contractor defense is dispositive of two of the contract based claims asserted on appeal. We consider below each of the contract based claims.

C. Analysis

1. *Superior Knowledge*

Hercules and Thompson each argue that because the government had superior knowledge of the dangers associated with dioxin, it had a contractual obligation to inform them of such dangers. Because the government failed to do so, they contend, the government breached its contractual obligation.

> The doctrine of superior knowledge is generally applied to situations where (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

American Ship Bldg. Co. v. United States, 654 F.2d 75, 79 (Ct. Cl. 1981). Thus, a claim under the doctrine

of superior knowledge is tenable where the government fails to provide a contractor with vital knowledge in the government's possession which bears upon the costs of the contractor's performance under the contract at issue. That was not the case here.

Hercules and Thompson each argue that summary judgment on this point was improperly granted because disputed factual issues remain concerning whether the type of damages they suffered were "foreseeable" within the meaning of *Hadley v. Baxendale.* Hercules further argues that a disputed factual issue exists regarding the relative levels of knowledge about the hazards of Agent Orange. These alleged disputed issues, however, are immaterial to our decision. Even assuming, *arguendo,* that (i) Hercules' and Thompson's damages were foreseeable, and (ii) the government had superior knowledge of the hazards associated with dioxin, such foreseeability and knowledge had no bearing on Hercules' and Thompson's performance under the contract—i.e., production costs or manufacturing times. Put another way, nothing the government did or failed to do had any impact upon Hercules' and Thompson's production of Agent Orange. As the Claims Court noted, the cases cited for the superior knowledge doctrine concern the withholding of superior knowledge that makes it more difficult to perform under the terms of the contract at issue. *Hercules,* 25 Cl. Ct. at 622-23; *Wm. T. Thompson,* 26 Cl. Ct. at 22-23. *See, e.g., Helene Curtis Indus., Inc. v. United States,* 312 F.2d 774 (Ct. Cl. 1963). We decline to accept Hercules' and Thompson's invitation to extend the doctrine of superior knowledge to encompass their claims for post-performance settlement and litigation expenses, because those expenses were not incurred during the performance of the underlying contracts.

2. *The Implied Warranty of Specifications*

Both Hercules and Thompson argue for recovery based upon a theory of an implied warranty of specifications,

as set forth in *United States v. Spearin*, 248 U.S. 132 (1918), and its progeny. *Spearin* stands for the proposition that when the government includes detailed specifications in a contract, it impliedly warrants that (i) if the contractor follows those specifications, the resultant product will not be defective or unsafe, and (ii) if the resultant product proves defective or unsafe, the contractor will not be liable for the consequences. *Spearin*, 248 U.S. at 136-37. As with any contract-based claim, however, to recover for a breach of warranty, a plaintiff must allege and prove (1) that a valid warranty existed, (2) the warranty was breached, and (3) plaintiff's damages were caused by the breach. *San Carlos Irrig. and Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989); *accord Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965) (stating that a plaintiff asserting a claim for breach of an implied warranty of specifications has the "burden of establishing the fundamental facts of liability, causation, and resultant injury."). Unlike the superior knowledge doctrine, discussed above, the implied warranty of specifications covers problems arising after performance of the underlying contract. *See Poorvu v. United States*, 420 F.2d 993 (Ct. Cl. 1970).

In the present case, Hercules and Thompson argue that because the government supplied the specifications and formula for Agent Orange, the government is liable for their injuries by reason of the breach of an implied warranty of specifications, even though the alleged harm (i.e., costs incurred in the Agent Orange litigation) occurred several years after completion of the Agent Orange production contracts. Both Hercules and Thompson contend that summary judgment was improperly granted because various factual issues remain in dispute with regard to their claims, including (i) whether an implied warranty arose out of the contracts, (ii) whether the type of damages sought were "reasonably foreseeable" at the time the contracts were formed, (iii) whether,

leaving aside the government contractor defense, Hercules and Thompson faced potential liability in the Agent Orange litigation, (iv) whether the government knew that Hercules and Thompson faced potential liability, (v) whether the government's defective specifications gave rise to their alleged potential liability, and (vi) whether the class action settlement constituted reasonable conduct in light of the potential liability.

We need not, however, resolve the above factual issues because a necessary element of appellants' breach of warranty claims—i.e., causation—is lacking. As noted above, to make out a *prima facie* case of breach of an implied warranty of specifications, Hercules and Thompson must show not only that the facts support an implied warranty, but also that the warranty was breached and that their damages were caused by the breach. *San Carlos*, 877 F.2d at 959. As seen above, as far as damages to the extent of contributions to the Agent Orange settlement fund are concerned, the Claims Court held that Hercules' and Thompson's claims failed because (i) the absence of scientific evidence regarding the consequences of dioxin exposure precluded a finding that the warranty was breached, (ii) even assuming the existence of an implied warranty of specifications, the warranty would not include the kind of indemnity sought here, and (iii) the availability of the government contractor defense precluded a finding that their damages were caused by the alleged breach. *Hercules*, 25 Cl. Ct. at 626-28; *Wm. T. Thompson*, 26 Cl. Ct. at 26-28. We agree with the Claims Court that the record from the Agent Orange litigation is sparse with respect to scientific proof that the veterans' injuries were caused by dioxin. We also agree with the Claims Court that the facts would have to be stretched to support the theory that, under an implied warranty or specifications, Hercules and Thompson would be entitled to recover from the government their contributions to the

Agent Orange settlement fund.[8] However, we prefer to rest our decision on the third ground articulated by the court: Hercules and Thompson cannot prove that their damages were caused by the government's alleged breach of an implied warranty of specifications because they

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[8] This view is based on the rationale underlying the Supreme Court's decisions in *Feres v. United States*, 340 U.S. 135 (1950), and *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977). In *Feres*, 340 U.S. 135 (1950), the Supreme Court held that the United States may not be sued in tort for injuries incurred by a serviceperson while on active duty. The Supreme Court had occasion in *Stencel Aero* to explicate the *Feres* decision in the context of service-related injuries allegedly caused by the actions of a government contractor. In *Stencel Aero*, an injured serviceman sued the manufacturer of his malfunctioning fighter plane on a product liability theory. Stencel Aero Engineering Corp. (Stencel Aero), the manufacturer, cross-claimed against the government for indemnity, claiming that any malfunction of its product was caused by defective, government-supplied specifications and components. Holding that the considerations relevant in *Feres* controlled the outcome of the case before it, the Supreme Court upheld the district court's grant of summary judgment for both the government and Stencel Aero against the serviceman, as well as the dismissal of Stencel Aero's cross-claim against the government. The Court reasoned that to allow an injured serviceperson to circumvent the *Feres* doctrine by suing a government contractor, who would then sue the government for indemnity, would have the same deleterious results as allowing tort suits directly against the government in the military context. *Stencel Aero*, 431 U.S. at 673. Thus, the Supreme Court determined that "[t]o permit [the serviceperson] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door." *Id.* (citations omitted).

Neither Hercules nor Thompson has asserted that any provisions of their respective contracts support the argument that the government agreed to indemnify them for third party tort claims. Absent any express provision, such an agreement to indemnify would have to be implied-in-fact. *See Lopez v. A.C. & S., Inc.*, 858 F.2d 712, 714-15 (Fed. Cir. 1988). In view of the *Feres-Stencel Aero* doctrine, it is difficult to envision the circumstances under which a court could find an implied-in-fact agreement on the part of the government to provide the kind of indemnity for which Hercules and Thompson argue.

were protected from liability to the Agent Orange plaintiffs by the government contractor defense.

The Supreme Court explained the government contractor defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). In *Boyle*, a serviceman was killed during a training exercise due to an alleged design defect in his aircraft. Boyle's personal representative (Boyle) brought a diversity action in federal district court against the government contractor that had manufactured the aircraft, but did not sue the government. Boyle alleged, *inter alia*, under Virginia tort law, that the contractor had defectively designed the aircraft's emergency escape-hatch system. The contractor contended that it had manufactured the escape-hatch system in accordance with government-supplied specifications as required by the contract, and therefore was not liable to Boyle. The jury returned a general verdict for Boyle, and the district court denied the contractor's motion for judgment notwithstanding the verdict. The United States Court of Appeals for the Fourth Circuit reversed and remanded with directions that judgment be entered for the contractor. The Fourth Circuit found, as a matter of federal law, that the contractor could not be held liable for the allegedly defective design because it had satisfied the requirements of the government contractor defense.

The Supreme Court granted certiorari, and held that where a government contractor has satisfied the requirements of the government contractor defense, as set forth in the *Boyle* opinion, the contractor cannot be held liable under state tort law, because to allow liability would frustrate specific objectives of federal legislation. Although Boyle's claim was asserted on the basis of state law, the Supreme Court concluded that "the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one—even though the dispute is one between private parties." *Boyle*,

487 U.S. at 506.[9] In cases where the government's interest is implicated, the Supreme Court continued, federal law will displace state law if there is a significant conflict between a federal policy and the operation of state law. *Id.* at 507. Looking to the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1988) (hereinafter, FTCA)[10], the Court reasoned that such a significant conflict was present under the circumstances, because to allow Boyle's suit against the contractor would constitute judicial second-guessing of decisions that Congress intended to be within the discretion of the U.S. military. *Id.* at 511.[11] To further define the contours of the government contractor defense, the Supreme Court in *Boyle* set forth the following three-part test:

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[9] The Court explained:

> The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.

Boyle, 487 U.S. at 507.

[10] In relevant part, the discretionary function exception to the FTCA states that the limited waiver of sovereign immunity in the FTCA does *not* extend to

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1988).

[11] The Court stated:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512. A contractor who satisfies this test is immune to tort liability under state law for defects in products manufactured for the government in accordance with government-supplied specifications.

As seen above, prior to *Boyle*, the district court and the Second Circuit each concluded that the government contractor defense operated to shield Hercules and Thompson. *See In re "Agent Orange"*, 565 F. Supp. at 1273-74 (1983 decision initially granting summary judgment in favor of Hercules and Thompson and two other Agent Orange manufacturers); *In re "Agent Orange"*, 611 F. Supp. at 1263 (1985 decision granting all the manufacturers summary judgment against the opt-out

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> guessing" of these judgments, see *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984), through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production. In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.

Boyle, 487 U.S. at 511-12 (footnote omitted).

plaintiffs following the Agent Orange litigation settlement); and *In re "Agent Orange,"* 818 F.2d at 189 (1987 court of appeals decision affirming summary judgment against the opt-out plaintiffs). Thus, Hercules and Thompson successfully argued on three separate occasions that the government contractor defense shielded them from liability for the veterans' tort claims. Consequently, there can be no serious doubt that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed against Hercules or Thompson.

Because the government contractor defense provided a complete defense to the veterans' tort claims, it cannot be said that the damages asserted by Hercules and Thompson were caused by the government, as the Claims Court recognized. As far as their contributions to the settlement fund are concerned ($18,772,568 in the case of Hercules and $3,096,597 in the case of Thompson), it was appellants' voluntary decision to enter into the settlement that led to those damages. The government did nothing to encourage or compel Hercules and Thompson to settle. It was appellants' decision to forego litigating the issue of the government contractor defense to completion that caused them to incur the monetary injury of the contribution to the settlement fund.

Based upon the theory of an implied warranty of specifications, Hercules and Thompson also contend that they are entitled to recover the attorney's fees which they incurred in the Agent Orange litigation. As seen above, in rejecting this element of appellants' claims, the Claims Court relied upon *Kania v. United States,* 650 F.2d at 269. In that case, Eugene Kania brought an action in one of this court's predecessors, the Court of Claims, in which he alleged that the government had breached a contract pursuant to which it had agreed not to prosecute him in return for his testimony before a federal grand jury. After he testified in the grand jury, Kania was

indicted for various offenses. He was successful, however, in his efforts to have the indictment dismissed, based upon his purported agreement with the government. After the dismissal, he sued in the Court of Claims seeking to recover the expenses incurred in defending against the government's charges. The Court of Claims held that it was without jurisdiction because, whatever arrangement existed between Kania and the government, "there was no contract sufficient to satisy this court's jurisdictional requirements." *Kania,* 650 F.2d at 269. The court then went on to state:

> Should this be in error, we must now add that jurisdiction to award counsel fees and other litigation expenses as an element of breach damages would be extremely dubious. It is the kind of consequential damages not normally awarded in contract breach cases. *William Green Construction Co. v. United States,* 201 Ct. Cl. 616, 477 F.2d 930 (1973), *cert. denied,* 417 U.S. 909, 94 S. Ct. 2606, 41 L.Ed.2d 213 (1974). Courts do not, in awarding breach damages, follow through the remote indirect consequences of the breach as distinguished from those directly in contemplation when the contract was made. *Northern Helex Co. v. United States,* 207 Ct. Cl. 862, 524 F.2d 707 (1975), *cert. denied,* 429 U.S. 866, 97 S. Ct. 176, 50 L.Ed.2d 146 (1976).

In light of *Kania,* even assuming the existence of an implied warranty of specifications in this case, such a warranty could not be construed to encompass a warranty by the government that Hercules and Thompson would not have to pay to defend themselves against tort claims that lacked merit because a legal doctrine, such as the government contractor defense, provided a defense to them. In the Claims Court, Hercules and Thompson alleged no facts suggesting that such a warranty—which would have to exist in order for Hercules and Thompson to recover their attorney's fees from the Agent Orange litigation—was "directly in contemplation" when Hercules and

Thompson entered into their respective contracts with the government. *Kania,* 650 F.2d at 269.

3. *Reverse Warranty*

Hercules argues that the government had an implied-in-fact contractual obligation to use the Agent Orange produced by it in a manner so as to avoid potential risks to servicemen and the subsequent tort suits against appellants. A material issue of fact exists, Hercules asserts, as to whether this obligation arose when the government ordered Hercules to package Agent Orange in drums marked only with an orange band, thus precluding Hercules from applying the extensive warnings and instructions normally placed on its commercial herbicides. According to Hercules, because it was not permitted to place adequate warnings on the Agent Orange containers, the government thereby warranted to Hercules that the government's use of the product would take into account the absence of warnings and instructions designed to assure the product's safe use. Alternatively, Hercules asserts that a material issue of fact exists as to whether the government's mixing of Hercules' dioxin-free Agent Orange with dioxin-tainted Agent Orange imposed potential liability on Hercules that otherwise would not have existed. In so mixing, Hercules argues, the government assumed obligations that properly include compensating it for liabiliites incurred as a result of such conduct. Hercules further contends that courts have recognized the existence of an implied-in-fact warranty running from the purchaser to the seller where the purchaser has engaged in conduct which warrants the imposition of a duty to exercise due care in using a seller's product. The Claims Court characterized Hercules' claim as being based on a "reverse warranty" theory. *Hercules,* 25 Cl. Ct. at 624.

Irrespective of the name used to identify the theory advanced by Hercules, we rejected a similar claim in *Lopez v. A.C. & S., Inc.,* 858 F.2d 712 (Fed. Cir.

1988), *aff'g* 649 F. Supp. 149 (W.D. Wash. 1986). In *Lopez*, a civilian employee exposed to asbestos at a naval shipyard brought an action in the United States District Court for the Western District of Washington against several manufacturers who had supplied the asbestos pursuant to a government contract. Upon settling the employee's claim, the asbestos manufacturers filed third-party complaints in the district court, based in part on the Little Tucker Act, 28 U.S.C. § 1346, seeking to recover their settlement payments and litigation expenses from the government. The manufacturers' Tucker Act claims were based on the theory that in specifying asbestos, the government impliedly warranted to the asbestos manufacturers that its use of their product would not expose the manufacturers to unforeseen defective product liabilities to persons who might be injured by exposure to the asbestos. *Lopez*, 858 F.2d at 714. In dismissing the Tucker Act claims, the district court held that such claims were barred by operation of the Anti-Deficiency Act, 31 U.S.C. § 1341. *Lopez*, 649 F. Supp. at 159. As an alternative basis, the district court dismissed the manufacturers' claims for lack of jurisdiction, noting that jurisdiction under the Tucker Act extends only to claims arising out of express or implied-in-fact contracts, and not to claims arising out of implied-in-law contracts. *Id.* The district court concluded that no express contract term existed and that, as a matter of law, the vendor/vendee relationship between the manufacturers and the government, standing alone, did not create an implied-in-fact agreement by the government to indemnify the manufacturers for injuries resulting from the use of the asbestos purchased under the contract. *Id.* at 160. We affirmed the district court's dismissal of the manufacturers' Tucker Act claims on the grounds that the Tucker Act did not provide for claims based on contracts implied-in-law, and that an implied-in-fact warranty running from the government to the manufacturers was a "bizarre and novel" theory that could not be inferred from the circumstances of the case. *Lopez*,

858 F.2d at 714-15, 716-17.[12] Although the *Lopez* decision did not go so far as to hold that a claim for breach of reverse warranty could never be brought under the Tucker Act, it made clear that any such warranty would have to be either express or implied-in-fact, rather than implied-in-law. *Id.* at 716.

Hercules has not alleged an express reverse warranty. Beyond that, we are hard-pressed to see how the circumstances of this case could support an inference that Hercules and the government came "to a meeting of the minds and [took] upon themselves [the] corresponding obligations and liabilities" that would accompany a warranty running from the purchaser to the seller. *Hercules*, 25 Cl. Ct. at 624 (citing *Hirschmann v. United States*, 11 Cl. Ct. 338, 342 (1986)).[13] We prefer, however, to rest our decision on this point on the government contractor defense. Even assuming that an implied-in-fact reverse warranty could be found and could be said to have been breached, Hercules' claim fails for the same reason that Hercules' and Thompson's claims based upon an implied warranty of specifications fail. Specifically, in view of the government contractor defense, Hercules could not prove that its damages were caused by the breach of such a warranty. Rather, Hercules' damages were the result of its decision to enter into the settlement with the Agent Orange plaintiffs.[14]

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[12] Because of our doubts regarding the conclusion that the Anti-Deficiency Act barred the manufacturers' Tucker Act claims, we chose not to rest our decision in *Lopez* on that ground.

[13] In view of the *Feres-Stencel Aero* doctrine, it is difficult to envision the circumstances under which a court could find on the part of the government the kind of implied-in-fact reverse warranty for which Hercules argues. *See supra* note 8.

[14] Just as it did in connection with the implied warranty of specifications theory, the rationale of *Kania* bars Hercules' claim under a theory of reverse warranty for the recovery of attorney fees and expenses incurred in the Agent Orange litigation.

4. *Implied-in-fact Contractual Obligation to Indemnify*

The government used the authority provided in section 101 of the DPA, 50 U.S.C. app. § 2071(a) (1964), to require both Hercules and Thompson to enter into contracts to produce Agent Orange for the Vietnam War effort. Based upon this fact, Thompson, but not Hercules, argued in the Claims Court that, pursuant to section 707 of the DPA, 50 U.S.C. app. § 2157 (1964), it was entitled to be indemnified by the government for its contribution to the Agent Orange settlement fund and for the expenses which it incurred in the Agent Orange litigation. The Claims Court rejected this argument. In so doing, it relied upon the reasoning of the district court in the Agent Orange litigation. *Wm. T. Thompson,* 26 Cl. Ct. at 28. There, in approving the 1984 settlement, the district court rejected the contention of the defendants that the Agent Orange plaintiffs were barred from asserting any claims against them because they were immunized from suit under section 707 of the DPA. *In re "Agent Orange,"* 597 F. Supp. at 844. The district court held that section 707, which states in part that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act," did not provide the immunity asserted by the Agent Orange defendants. 597 F. Supp. at 844-45. The district court stated:

> the protection afforded by section 707 should correspond to the risk imposed, viz., the possible need for the contractor to break its contracts with third parties or the increased risk to employees or users posed by the speeded up production.

597 F. Supp. at 845.

On appeal, Thompson contends that under the circumstances of the compelled production here, section 707 of

the DPA operated to create an implied-in-fact obligation on the part of the government to indemnify Thompson for the damages it incurred: its contribution to the Agent Orange settlement fund and the expenses which it incurred in the Agent Orange litigation. Thompson argues that the Claims Court erred in accepting the reasoning of the district court. Specifically, Thompson contends that because section 101 of the DPA authorizes the President to compel contract performance as well as contract acceptance, the "risk imposed" is not limited to breach of contract actions arising out of preference given to DPA contracts, but rather extends to possible tort suits by third parties arising from subsequent use of the product produced under the DPA contract.

We disagree. As did the district court in Agent Orange litigation and the Claims Court in this suit, we read section 707 of the DPA as providing a defense for a DPA contractor against a suit by a non-government customer in the event that the DPA contractor is forced to breach another contract to fulfill the government's requirements. Section 707 does not provide the kind of protection asserted by Thompson.[15]

In interpreting a statute, we first turn to its language. *VE Holding Co. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990) (citing *Mallard v. United States Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 300-01 (1989)), *cert. denied*, 111 S. Ct. 1315 (1991). Accordingly, we begin our analysis with the pertinent statutory provisions: sections 101 and 707 of the DPA. Section 101(a) of the DPA states:

> The President is hereby authorized (1) to require that performance under contracts or orders (other

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[15] The circumstances of this case do not require us to address the holding of the district court that "the protection afforded by section 707" serves to protect DPA contractors against "the increased risk to employees or users posed by . . . speeded up production." *In re "Agent Orange"*, 597 F. Supp. at 845.

> than contracts of employment) which he deems necessary or appropriate to promote the national defense *shall take priority* over performance under any other contract or order, and, *for the purpose of assuring such priority,* to require acceptance and performance of such contracts or orders *in preference* to other contracts or orders by any person he finds capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

50 U.S.C. app. § 2071(a) (1964) (emphasis supplied).

Section 707 of the DPA states as follows:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned or for which materials or facilities are allocated under title I of this Act or under any rule, regulation, or order issued thereunder, by charging higher prices or by imposing different terms and conditions for such orders or contracts than for other generally comparable orders or contracts, or in any other manner.

50 U.S.C. app. § 2157 (1964).

The language of section 101(a) makes it clear that the purpose of the statute is to authorize the President to dictate that preference be given to government contracts which are necessary to promote the national defense. Indeed, section 101 is titled "Priority in contracts and orders." Although Thompson correctly observes that

the statute authorizes the President to compel both contract performance and contract acceptance, section 101 (a) expressly states that the granting of such authority is "for the purpose of assuring . . . priority." Significantly, section 101(a) does not mention either the specific nature of performance under a DPA contract, or the subsequent use of goods produced under such a contract. Therefore, we conclude that, while the risk imposed by section 101 (a) does include the possible need of a contractor to break its contracts with third parties in order to give preference to a DPA contract, it does not include the risk that the product produced under the DPA contract will be inherently unsafe to users.

Once a contractor has been compelled to accept a national defense contract under section 101(a), section 707 acts to shield the contractor from liability resulting from compliance with that section. At issue in this case is the nature of the liability against which the contractor is shielded.

As noted above, in complying with DPA section 101(a) a contractor may have to re-prioritize its outstanding contracts in order to give the required preference to a compelled DPA contract. It stands to reason that the protection provided by DPA section 707 extends only to shield a contractor from breach of contract liability arising as a consequence of such re-prioritization. First, it is a settled rule of statutory interpretation that separate provisions of a statute are to be construed and interpreted together and in light of each other to ascertain the true legislative intent. This court has explained:

> When the legislative purpose is incorporated in a complex piece of legislation, such as those establishing a major regulatory or entitlement program, the meaning of any particular phrase or provision cannot be securely known simply by taking the words out of context and treating them as self-evident. This rather straightforward homily is captured in the more

> pretentious proposition that parts of a statute *in pari materia* must be construed together.

Amendola v. Secretary, Dep't of Health and Human Servs., 989 F.2d 1180, 1182 (Fed. Cir. 1993); *accord Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984) (stating that where two statutory provisions are enacted *in pari materia*, a legislative intent to have the provisions "work harmoniously together" is to be inferred). To hold that section 707 protects contractors against a risk which is greater than that created by the statute with which it operates would violate this rule.

Furthermore, the language of section 707 itself supports the conclusion that the section does not extend the kind of indemnity asserted by Hercules. The second sentence of section 707, which prohibits discrimination "against contracts to which priority is assigned . . . ," reinforces the view that the immunity from suit provided by section 707 does not extend to tort suits in which it is alleged that the item produced by the DPA contractor is inherently unsafe to users. Rather, we conclude that to the extent relevant here, the intended protection of section 707 is analogous to that provided under the common-law doctrine of impossibility of performance, which excuses delay or nonperformance of a contract when the agreed upon performance has been rendered "commercially impracticable" by an unforeseen supervening event not within the contemplation of the parties at the time the contract was formed. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 997 (5th Cir. 1976) ("[DPA section 707] is simply declaratory of the common law [doctrine of impossibility].") (quoting *United States v. Texas Construction Company*, 224 F.2d 289, 293 (5th Cir. 1955)). We also agree with the district court, *see In re "Agent Orange,"* 597 F. Supp. at 845, that if Congress had intended section 707 to impose upon the government the kind of liability asserted

by Thompson, it would have said so in clear and unequivocal terms. *See, e.g., United States v. International Business Machs. Corp.*, 892 F.2d 1006, 1009 (Fed. Cir. 1988) ("Had Congress intended to make the exemptions permanent, it knew how: it could and we believe would have used words of futurity. . . .").

In sum, the protection afforded by section 707 of the DPA extends no further than the risk imposed by section 101(a) of the DPA. Accordingly, invocation of the DPA by the government for the production of Agent Orange did not give rise to an implied-in-fact contractual obligation on the part of the government to indemnify Thompson for its contribution to the Agent Orange settlement fund or for the expenses which Thompson incurred in the Agent Orange litigation.

CONCLUSION

For the foregoing reasons, the judgments of the Claims Court are affirmed.

PLAGER, *Circuit Judge*, dissenting.

The story of the litigation stemming from our Government's use of Agent Orange during the Vietnam War is long and complex. *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (enlarged ed., 1987). It may be that it is best to put this chapter of our nation's history behind us, and to bury the issues with the dead. Appellants, by bringing this suit, do not allow us that peace. Be that as it may, as a court of law we are obliged to give appellants whatever justice the law affords. I believe the law affords substantially more justice than the majority concedes.

The background of this particular case is set forth in some detail by the majority. Undue attention to trees, however, often hides the forest. Appellants, the Hercules and Thompson chemical companies, manufactured Agent Orange pursuant to contracts made by and with the Government. Indeed, both Hercules and Thompson allege that the contracts were for a product which they did not choose to make, and which they were compelled to produce under penalty of law. The companies, along with others, were sued some years back by veterans and their families (collectively "the *Agent Orange* plaintiffs") for injuries caused by exposure to Agent Orange when the Government used the defoliant in pursuit of its war in Vietnam; appellants claim that the Government should indemnify them for the financial losses they sustained in the settlement of the Agent Orange litigation.

Appellants present a host of arguments founded in government contract law, each of which a majority of this panel rejects. The many points of government contract law raised in this case and so finely parsed, however, should not be allowed to obscure the fundamental question: if the Government compels manufacture of a product by private companies, a product known to the Government to be potentially dangerous, and the use by the

Government of the product causes the manufacturers to incur liability, may the Government claim immunity from the consequences of its conduct? I think not.

1.

The answer the Government gives, and the majority accepts, to this question is that there was no liability for the manufacturers to incur—the manufacturers could not have been held liable for the injuries sustained by the *Agent Orange* plaintiffs because the manufacturers were totally protected by a doctrine known as the government contractor defense. *Slip op.* at 23. The majority concludes from this that the over twenty million dollars paid to the *Agent Orange* plaintiffs by Hercules and Thompson resulted from a "voluntary decision" by the companies. *Slip op.* at 27.

I find that reasoning unpersuasive. While there no doubt are civic-minded individuals in the upper ranks of both companies, and perhaps even among their lawyers, the notion that these manufacturers voluntarily made a twenty million dollar contribution to the veterans of the Vietnam War and their families out of the goodness of their hearts seems rather far fetched, and might even raise questions about their fiduciary obligations to their shareholders.[1]

The trial judge who presided over the settlement, an experienced and well-respected jurist, must have believed there was at least some ground upon which liability could be found. This was not a case in which the parties came to the judge with an agreed settlement, one which the judge without further exploration approved. As the record shows, two trial judges shared this case. The first

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[1] If the companies' lawyers advised that the making of the contribution was necessary, when the law so clearly provided an absolute and airtight defense to liability, there might be a malpractice issue as well.

held that, under the government contractor defense as a matter of law, neither Hercules nor Thompson were liable for the veterans' claimed injuries. *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263 (E.D.N.Y. 1983). However, before an order to dismiss was entered by this judge, a second judge assumed the case.[2] The second judge rescinded the first judge's summary judgment for the manufacturers, and denied the motion to dismiss. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242 (E.D.N.Y. 1984). This judge must have believed that there was a valid and ongoing "case or controversy," or the court could not have retained jurisdiction over these defendants. This same judge presided over the extensive settlement negotiations conducted in his courthouse. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985); *see also* Schuck, *supra*, at 143 *et seq*. We must assume that this trial judge acted in good faith in a belief that the manufacturers might not be able to escape all liability. It ill behooves the Government, or this court, years later to question whether the trial judge properly understood the law of the case before him.

2.

The majority concludes that, despite what the trial judge may have believed, the Government had no liability to these contractors because of the government contractor defense as explicated in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). In the majority's view, *Boyle* disposes of appellants' implied warranty of specifications theory because the Supreme Court in *Boyle* in effect immunizes contractors such as these from all liability in situations such as that in the original *Agent Orange* plaintiffs' suit. There are at least two problems with this reasoning.

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[2] Judge George C. Pratt, the judge originally assigned to these cases, was elevated to the Court of Appeals, and his responsibilities as the trial judge were reassigned to Chief Judge Jack Weinstein.

For one, *Boyle* was decided in 1988, some four years after the settlement that is the subject of this suit.[3] Yet the issue as the majority poses it is not whether years later the substantive law of the case might have been found (or might have changed?) to favor the companies, but whether at the time of the settlement the companies simply gave away money to the plaintiffs, or whether they settled under a reasonable apprehension of legal compulsion in order to minimize their (and the Government's) potential liability.

The second reason why *Boyle* is inapposite to this case that the issue and holding in *Boyle* turned on a question of federal preemption, an issue not in this case. The question in *Boyle* is, in a suit on behalf of a deceased military officer against the manufacturer of a product purchased by the military and alleged to have caused the death, a suit which was brought under the substantive law of a particular state, may the Government's manufacturer be held liable under state tort law. The Supreme Court answered no. The suit was brought in Federal Court as a diversity suit with a state cause of action. Although the Government was not the named defendant, the Supreme Court viewed the case as implicating the Federal Tort Claims Act (FTCA), the statute in which Congress waived the Government's immunity from tort liability. *See* 28 U.S.C. § 1346(b). The Supreme Court decided that the discretionary function exemption of the FTCA applied—the design of the escape hatch of the airplane was an exercise of federal discretion, and therefore state law was displaced. *See* 28 U.S.C. § 2680(a).

In the *Agent Orange* litigation, suit was brought by the plaintiffs not as a state tort action under the FTCA, but as a federal law action based on certain federal statutes

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[3] The Agent Orange plaintiffs filed their original suit in July 1978; after extensive pretrial proceedings, trial was set for May 7, 1984. The case was settled that day.

and on case law recognizing, even after *Erie*,[4] a limited scope for federal common law.[5] Jurisdiction was alleged, not in diversity, but under "the common law and/or the statutory laws of the United States of America," as a federal question case under 28 U.S.C. § 1331.[6] The original trial judge held that substantial federal interests were affected by the litigation, and that federal common law provided both the substantive measure of liability and the basis for jurisdiction.[7]

The Second Circuit on appeal reversed the trial judge's ruling on jurisdiction, and held the case was properly in federal court, but on diversity of citizenship jurisdiction.[8] On remand the second trial judge ruled that this did not necessarily affect the substantive law of the case. In an exhaustive opinion he ruled that, as a choice of law rule, the substantive law of the case remained one of federal law: a federal or national consensus common law.[9] Thus the preemption rule—whether federal law supercedes state substantive law in these cases—which was the concern in *Boyle* has no applicability to the *Agent Orange* litigation, a litigation in which federal law defined the substantive standard to be applied.

The difficulty the majority has in finding a satisfactory rationale for the outcome it supports is understandable. The so-called "government contractor defense" is a label

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[4] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[5] *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

[6] *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 737, 740 (E.D.N.Y. 1979).

[7] *Id.* at 744.

[8] *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980).

[9] *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984).

hung on a group of issues which first found expression in *Feres v. United States*, 340 U.S. 135 (1950). In that case the Supreme Court was called upon to decide whether the general waiver of tort immunity contained in the Federal Tort Claims Act gave military personnel the right to sue the Federal Government under routine tort theories in state courts. The Court held that, for a variety of policy reasons, the Act did not apply to injuries incident to military service; military personnel could not sue their employer in state courts.

Later, in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), the Court extended *Feres* and held that neither the Government nor the manufacturer were liable to a military pilot for alleged negligence in the design and construction of an airplane's life support system. However, the Court in *Stencel* revisited the policy arguments on which *Feres* stood, and revised its rationale for the result. Thus began a series of cases in which the Court has tried to find a reasoned basis for the military exception rule,[10] culminating in *United States v. Johnson*, in which four members of the Court were of the view that *Feres* had been wrongly decided,[11] and finally *Boyle*, with a different rationale altogether, keyed to the language of the FTCA itself.[12]

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[10] *See, e.g., United States v. Shearer*, 473 U.S. 52 (1985).

[11] *United States v. Johnson*, 481 U.S. 681, 692 (1987) (Justice Scalia, with whom Justices Brennan, Marshall, and Stevens joined, dissenting).

[12] Although the question of government liability to military personnel would seem of direct interest to only a small segment of the legal profession, the *Feres-Stencel-Boyle* cases have generated their share of academic attention, largely critical. One of the most recent and exhaustive reviews is David E. Seidelson, *From* Feres v. United States *to* Boyle v. United Technologies Corp.: *An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 Duq. L. Rev. 219 (1994). *See also* Michael D. Green and Richard A. Matasar, *The Supreme Court and the Prod-*

In light of this history, to suggest that the evolving government contractor defense would clearly dictate the outcome in the original *Agent Orange* litigation seems to me to be unwarranted historical revisionism, out of place in the decision before us in this case. I do not know what the ultimate decision in the *Agent Orange* litigation would have been on this issue, nor does anyone.[13] Since I find unpersuasive the majority's defense of the trial judge's summary judgment on this point, and since I believe there are a number of unresolved fact and law issues, I would return the case to the Court of Federal Claims with instructions to hold a full trial on the issues.

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ucts Liability Crisis: Lessons from Boyle's *Government Contractor Defense*, 63 S. Cal. L. Rev. 637 (1990); Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who is to Guard the Guards Themselves?*, 1989 Duke L. J. 1597; John Paul Stevens, *Is Justice Irrelevant?*, 87 Nw. U. L. Rev. 1121 (1993).

[13] In its 1987 opinion upholding both the settlement in the original litigation and Judge Weinstein's later dismissal of the 'opt-out' cases, the Second Circuit had to walk a tight line. In effect, the court had to find a cause of action for the one (in support of the trial judge's denial of the motion to dismiss the original defendants), but not for the other (in support of the grant of the motion to dismiss regarding the opt-outs). The Second Circuit opined that "in the light of hindsight, some 15 to 20 years after the fact, the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent Orange, and there cannot have been a breach of an earlier duty to inform the government of known hazards." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 174 (2d Cir. 1987). In like vein the court thought that "defendants clearly did not breach any duty to inform the government of hazards relating to Agent Orange," and thus were protected by the 'military contractor defense.' *Id.* at 178. To the extent those conclusions were invoked as a rationale for affirming the judgments against the opt-out plaintiffs, they are arguably defensible given the burdens of proof and deference owed the trial judge. However, as a basis for initially predicting the eventual outcome of the original litigation, they would be inconsistent with the position taken by Judge Weinstein, and are speculative.

3.

A few remaining observations about the trees. The majority has also rejected appellants' theory of government liability under the doctrine of superior knowledge. If the Government's knowledge is superior to that of the contractor, the Government may incur liability if it fails to disclose information required by the contractor. There are "instances in which the defendant [the Government] is clearly under such an affirmative obligation and cannot remain silent." *Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774, 778 (Ct. Cl. 1963). The Government had more knowledge of the potential harm caused by Agent Orange than did appellants, who had not participated in the devolopment of, had little experience with, and were relatively ignorant regarding the health hazards posed by, Agent Orange. Thus appellants contend that the Government is responsible for the harms caused to the *Agent Orange* plaintiffs, and that consequently the Government should pay appellants' share of the settlement fund.

The majority disagrees. It understands *American Ship Building Co. v. United States*, 654 F.2d 75 (Ct. Cl. 1981), to require that the Government divulge information *only* when the contractor's ignorance would hinder the contractor's *performance* of the contract. In this case, the costs imposed on the appellants are the result of a settlement reached long after performance had ceased. The majority therefore holds that appellants cannot recover under the doctrine of superior knowledge because the damages arose after performance.

There is neither prior authority nor present reason to limit the doctrine of superior knowledge to require compensation only for difficulties incurred during performance.

> The doctrine of superior knowledge *is generally applied* to situations where (1) a contractor undertakes to perform without vital knowledge of a fact

> that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information. *See, e.g. Helene Curtis Industries, Inc. v. United States,* 160 Ct. Cl. 437, 312 F.2d 774 (1963).

American Ship, 654 F.2d at 79 (emphasis supplied). Contrary to the majority's deployment of the case, nothing in *American Ship* confines the doctrine of superior knowledge to information regarding the performance of contracts. *American Ship* merely notes that the doctrine has *generally* been invoked in cases in which the contractor's performance was hindered because of the Government's failure to divulge information.

The majority differentiates the doctrine of superior knowledge from the doctrine of implied warranty of specification, announced in *United States v. Spearin,* 248 U.S. 132 (1918). The majority acknowledges that, under the latter doctrine, government liability is not limited to contract performance, but extends to later losses as well. *Slip op.* at 20. *Spearin* requires that "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *Id.,* 248 U.S. at 136. The theory is that the author of a plan detailed enough to comprise specifications often possesses knowledge superior to that of the party who contracts to execute that plan. "Specifications so susceptible of a misleading reading (or implication) subject the [Government] to answer to a contractor who has actually been misled to his injury. *United States v. Spearin,* 248 U.S. 132, 137 (1918)." *Helene Curtis,* 312 F.2d at 778 (citation abbreviated).

However, as the quotation above from *American Ship* indicates, the Court of Claims in *American Ship* relied on

Helene Curtis, which is in turn founded on *Spearin.* The doctrines of superior knowledge and the implied warranty of specification are thus different expressions of a single principle. Both doctrines ultimately rest upon general contract law. If the Government's incomplete or misleading information, or its particular specification of its requirements, imposes losses, now or later, on the contractor, then the Government, like any other contractor, should not escape responsibility. That responsibility may well extend beyond the period of performance of the contract; there is no reason to hold that the doctrine of superior knowledge makes the Government responsible only for hinderances to performance of the contract.

Finally, as noted earlier, the Government compelled appellants to produce Agent Orange under the authority granted by the Defense Production Act (DPA), 50 U.S.C. app. §§ 2061 *et seq.* (1964). The DPA requires manufacturers to accept contracts deemed necessary to the national defense, and further requires manufacturers to give such contracts absolute priority over other obligations. 50 U.S.C. app. § 2071(a) (1964).

The DPA also includes a "hold harmless" provision, 50 U.S.C. app. § 2157 (1964), that states:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act . . .

The Court of Federal Claims rejected Thompson's argument that § 2157 immunizes the manufacturers from liability for any eventual use of the defoliant.[14] It held that the provision should be read narrowly, to apply only to

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[14] **Interestingly, both Hercules and Thompson alleged in their complaints that they had been compelled under the Defense Production Act to manufacture Agent Orange, but only Thompson briefed on appeal the question of whether the 'hold harmless' clause of the Act applied.**

liability caused by giving the Government its claimed priority for production. Thompson argues that even if that is so, the provision at least supports the conclusion that there is an implied-in-fact obligation on the part of the Government to indemnify Thompson for the damages incurred. The majority agrees with the trial court's reading of the provision, and concludes that the immunity —like the common-law doctrine of impossibility of performance—extends only to contract breaches required by the Government's imposition. From that, the majority concludes that the Government is immune from the claims of the manufacturers.

I have three problems with the majority's reading of the DPA. First, the majority's conclusion is a *non sequitur*: that the Act grants manufacturers immunity against third parties on contractual claims does not suggest, much less require, that the Act grants the Government immunity against manufacturers who suffer other losses.

Second, although justice may be blind, judges should take some cognizance of practical realities. A statute that gives the Government the authority to force private manufacturers to accept contracts and to place such contracts before their other obligations gives the Government substantial operational control over those enterprises. Under the DPA, the Government in effect can seize the company. Congress recognized that reality, and specified a hold harmless clause in the Act.

Third, the majority ignores the language of the statute. The majority argues that "if Congress had intended [the statute] to impose upon the government the kind of liability asserted by Thompson, it would have said so in clear and unequivocal terms." *Slip Op.* at 38. The *Agent Orange* litigation was historic, and was both substantively and procedurally unimaginable at the time of the passage of the Defense Production Act. We should not expect Congress to have specifically described a liability

problem arising from a judiical process of which they could have had scant idea. Yet if Congress intended to limit the sweeping scope of the hold harmless provision to contract performance only, Congress could have written, for example, "No person shall be held liable for *breach of contractual obligations* caused by any act or failure to act, etc." That is not the language of the statute. It is difficult to imagine more "clear and unequivocal" terms than that actually used by Congress: *"No person shall be held liable for damages* or penalties for any act or failure to act resulting *directly or indirectly* from compliance with a rule, regulation, or order issued pursuant to this Act . . ." 50 U.S.C. app. § 2157 (1964). The law as well as the circumstances support the Government's liability.

4.

Over the past several years the parties to this litigation and the courts have expended much effort phrasing the issues presented by this case in terms of government contract law. As the preceding discussion suggests, however, the conceptual grammar of government contract law may be inadequate to the task. Because the relationship between appellants and the Government was never arms-length, any discussion of that relationship in doctrinal terms that presume freedom of contract is incoherent.

The twenty million dollars or so at stake in this litigation may be small potatoes to the Federal Government, and we do not know how much the money means to the financial health of appellants. But if there ever is a case in which we can fairly say, it is not the money, it is the principle that matters, this is the case. At the core of this litigation is the way in which our nation distributes the burden of its military activity among its citizens. In wartime, that burden is inevitably distributed unevenly. We cleave to the Constitution, however, in spite of unfairness. The Constitution provides an apt analogy—the Takings Clause of the Fifth Amendment is "designed

to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The question in this case is whether the public should pay for the damages that the federal judiciary has attributed to the use of Agent Orange in Vietnam, or whether appellants alone should bear the burden.

The Government took away appellants' control over their businesses. By assuming control, the Government deprived appellants of their ability to conduct themselves prudently, and instead forced appellants to engage in a dangerous enterprise, the manufacture of Agent Orange. In exposing appellants to risk, the Government incurred an obligation to make appellants whole should the danger come to pass. The danger of the Government's use of Agent Orange is now clear, or as clear as our law can make it. Equally clear is the Government's obligation to indemnify appellants. No amount of niggling at doctrine can obscure that simple truth.

I respectfully dissent.

IN THE UNITED STATES CLAIMS COURT

No. 90-496C

(Filed: Apr 2 1992)

HERCULES INCORPORATED

v.

THE UNITED STATES

Contracts; Agent Orange; implied-in-fact contract terms; Government contractor defense; indemnification.

OPINION

Yock, *Judge.*

This contractual dispute is before the Court on the defendant's motion for summary judgment, filed pursuant to USCC Rule 56.[1] For the reasons stated herein, the defendant's motion for summary judgment is granted, and plaintiff's complaint will be dismissed.

Facts

Plaintiff, Hercules Incorporated (Hercules), was a manufacturer in the mid to late 1960's of a product known as Agent Orange, which was used for military purposes by the United States Government as a defoliant

[1] Defendant has, in the alternative, moved to dismiss, pursuant to USCC Rule 12.

during the Vietnam War. Years later, Vietnam veterans and their families, alleging that exposure to Agent Orange caused death, injuries, and birth defects, sued all the Agent Orange manufacturers, including Hercules. This multi-district product liability tort suit was settled before trial, *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter *"Settlement Opinion"*), 597 F. Supp. 740 (E.D. N.Y. 1984), *aff'd,* 818 F.2d 145 (2d Cir. 1987), *cert. denied,* 484 U.S. 1004 (1988), and Hercules was required to pay some $18 million of the total settlement amount. The instant contract suit was brought by Hercules in an attempt to recover from the United States Government the costs it incurred in defending and settling the suit in the district court.

The following facts are essentially uncontroverted: Agent Orange is a mixture of two phenoxy herbicides, 2,4-Dichlorophenoxyacetic Acid (2,4-D), and 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T) in a 50/50 blend. Depending on the process utilized, when 2,4,5-T is produced, it may contain varying amounts of 2,3,7,8-Tetrachlorodibenzo-p-dioxin (dioxin), a toxic substance, although not a key ingredient of either Agent Orange or 2,4,5-T.[2]

As one court noted, "the government and the military had a considerable amount of knowledge about 2,4,5-T, about dioxin, and about the hazards associated with both." *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter "*Agent Orange*"), 565 F. Supp. 1263, 1266 (E.D. N.Y. 1983). This knowledge extended back into the 1950's, and the level of knowledge increased rapidly during the mid to late 1960's. Much of the Government's knowledge was classified and not shared with the chemical companies. *Id.* at 267-68. However, some of the bigger chemical companies that were producing Agent Orange

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[2] While it has not been proven scientifically or legally, the Vietnam veterans believed that exposure to Agent Orange caused cancer and birth defects, and this was allegedly caused by the dioxin present in this defoliant.

for the military, including Hercules, did develop a considerable amount of knowledge about the dangers associated with the production of 2,4,5-T and the dioxin contained therein during this same time frame.

Hercules began producing phenoxy herbicides that contained 2,4,5-T by itself, or in a mixture with 2,4-D in 1961,[3] the same year the Government began to use a variety of phenoxy herbicides in Southeast Asia to defoliate trees and plant life to eliminate possible hiding places for the Viet Cong and the North Vietnamese troops.[4]

As the Vietnam War progressed, the military needed greater amounts of Agent Orange, which Hercules supplied to the Government through fifteen contracts between May 8, 1964, and May 20, 1968. These contracts specified the formula for producing Agent Orange, and Hercules, which apparently provided no input to the Government with respect to either developing or modifying these specifications, complied with the specifications. In early 1965, during a meeting called by Dow Chemical Company, Hercules was notified of industrial health problems associated with the production of 2,4,5-T, and, later that year, it modified its process of production to eliminate the dioxin contamination. *Agent Orange*, 565 F. Supp. at 1269, 1274.[5] Thereafter, from 1966 through 1970, Her-

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[3] Reasor-Hill Corporation, which was purchased by Hercules in 1961, produced herbicides containing 2,4,5-T or 2,4-D beginning in the early 1950's.

[4] The defoliant Agent Orange and Hercules' commercial herbicides were of different concentrations and were applied differently. Agent Orange contained roughly twice as much 2,4,5-T per gallon as the typical Hercules herbicide. Also, the Government used Agent Orange undiluted and sprayed at a rate of 3 gallons per acre, as compared to the dilution of Hercules' herbicide at a ratio of 100 to 1, sprayed at a rate of 1 gallon per acre.

[5] The Government was not invited to that meeting, and there was evidence that Dow feared Government intervention into, and control of, the entire herbicide industry. *Agent Orange*, 565 F. Supp. at 1269.

cules' product contained no measurable dioxin. *Id.* However, the Government mixed the dioxin-free Agent Orange produced by Hercules with the dioxin-contaminated Agent Orange produced by other manufacturers, and these mixtures were sprayed by the military in the Southeast Asia war zone.

Some ten years later, starting in 1979, Vietnam veterans, or their estates, began filing negligence and strict liability tort actions against the chemical companies that produced Agent Orange for the Government. According to these plaintiffs, in view of the toxicity of dioxin, exposure to the Agent Orange that contained dioxin caused cancer, miscarriages, and birth defects. These actions were consolidated in the Eastern District of New York under the heading MDL No. 381.

On May 20, 1983, Hercules was granted summary judgment, based upon the district court's finding that the plaintiff's Agent Orange product was dioxin free, so Hercules had no knowledge of harm from dioxin contamination, and thus did not know more than the Government about the hazards associated with the use of its product. *Agent Orange,* 565 F. Supp. at 1274. Unfortunately for Hercules, the granting of summary judgment was reversed by the succeeding district court judge approximately five months later, and Hercules was again made part of the litigation, along with all the other manufacturers of Agent Orange.

On May 7, 1984, the date trial was to begin, the parties reached a settlement, and a $180 million settlement fund was created. *Settlement Opinion,* 597 F. Supp. at 748. The district court judge, weighing the potential costs as well as the uncertainties associated with trial for both sides, found that the proposed settlement was fair, reasonable, and adequate. However, he did note that plaintiffs *had never* produced any persuasive evidence showing a causal relationship between the exposure to small quantities of dioxin found in Agent Orange and the

claimed injuries. *Id.*, 597 F. Supp. at 782-95. The district court's settlement opinion was affirmed, and the appeals court noted that it was "essentially a settlement at nuisance value," based on the "grave weaknesses in plaintiffs' case," since "the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent Orange * * *." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 171, 174 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Hercules' share of the settlement was $18,772,568, which it paid into the settlement fund in 1984. According to Hercules, it also spent over $6 million in legal fees during the Agent Orange litigation.

Nearly 300 plaintiffs had previously opted out of the class action suit, and thus were not bound by the May, 1984 settlement. Hercules and other Agent Orange manufacturers successfully moved for summary judgment against these remaining plaintiffs. *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter *"Opt-out Opinion"*), 611 F. Supp. 1223 (E.D. N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The district court judge found that (1) plaintiffs failed to present credible evidence as to causation, and that (2) the plaintiffs' claims were barred by the Government contractor defense.[8] *Id.*, 611 F. Supp. at 1229, 1258-63. The appeals court affirmed, based upon the Government contractor defense, and also agreed that "the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam * * *." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 190 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

The plaintiff filed its complaint with this Court on June 8, 1990. In this suit, plaintiff seeks contractual in-

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[8] **The court also found that no individual plaintiff could prove which defendant chemical company had manufactured the Agent Orange to which he allegedly had been exposed.**

demnification from the Government of the amounts plaintiff paid in settlement of the veterans' class action suit, legal fees, expenses, and costs in connection with defending all of the Agent Orange suits brought against it and "all other financial and consequential damages caused by the defendant's breach of its contractual warranties and duties." In response, the Government filed a motion for summary judgment on January 8, 1991, seeking dismissal of the plaintiff's contract suit as a matter of law. The plaintiff opposes the motion and asserts that the matter should move forward to trial.

Discussion

"Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *GAF Corp. v. United States,* 91 Cl. Ct. 490, 496 (1990), *aff'd,* 932 F.2d 947 (Fed. Cir. 1991), *cert. denied,* 117 L. Ed. 2d 131 (1992). The substantive law involved in the suit determines which facts are material, and only disputes over material facts, those which might affect the outcome of the suit under the governing law, may properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Disputes over facts that are not relevant under the controlling law will not prevent the entry of summary judgment. *Id.* The moving party, in this case the defendant, has the burden of establishing that there are no genuine issues of material fact, *Celotex Corp. v. Catrett,* 477 U.S. 317, 321 (1986), and that it is entitled to judgment as a matter of law. *GAF Corp.,* 19 Cl. Ct. at 496. For the following reasons, this Court finds that the Government has met its burden of establishing that there are no genuine material issues of fact in dispute and that it is entitled to judgment as a matter of law.

In its complaint, the plaintiff has alleged that it is entitled to contractual indemnification from the Govern-

ment under four counts. All four of the counts are based on alleged breaches of implied-in-fact contract obligations. Plaintiff submits that it produced Agent Orange in the 1960's under written contracts with the Government that contained detailed design specifications that were developed solely by the Government. It contends further that it had no part in the development of the specifications, that it manufactured the Agent Orange to the exact specifications ordered by the Government, and that it had little, if any, knowledge about the potential hazards that were inherent in the product as produced and used by the Go ernment. Given these factual circumstances, the plaintiff argues that it is entitled to indemnification in contract for the losses it incurred in defending against and settling the tort suits brought by the Vietnam veterans and their families against the manufacturers of Agent Orange. Hercules believes it is only equitable and fair that the Government assume the obligation and be allocated these risks because it ordered the production of Agent Orange to its own specifications, completely controlled the use (or misuse) of the product, and never shared any information about potential hazards in the product with the manufacturer. In short, if anyone was negligent here, it was the Government and the financial liability should, therefore, be borne by it and not by the innocent manufacturers of Agent Orange. The plaintiff, therefore, contends that it is entitled to be indemnified by the Government for the costs it incurred under any one of four implied-in-fact contractual theories.

The plaintiff's first theory involves the matter of the Government's alleged superior knowledge. Here, the plaintiff asserts that there was an implied-in-fact obligation on the part of the Government to reveal its *superior knowledge* concerning the unprecedented military use of Agent Orange by the Government so as to not increase the plaintiff's cost of performance under the contract.

The second theory alleged is a straight forward duty on the part of the Government "to exercise *good faith*

and not increase Hercules costs by using Agent Orange in Southeast Asia in an unprecedented military manner that failed to avoid potential health risks, including by not taking adequate precautions and safeguards or providing * * * adequate warnings * * *." (Emphasis added.)

The third theory alleged by the plaintiff would place a duty on the Government to *use* the plaintiff's product after production in a way that would avoid potential health risks and thus avoid harming the plaintiff. This is the so-called reverse warranty obligation on the part of the Government.

Fourth and finally, the plaintiff alleges a warranty of specification theory. This theory is based upon an alleged Governmental breach of its implied-in-fact contractual obligation "to establish specifications and requirements for Agent Orange sufficient to make Agent Orange adequate and suitable for the unprecedented intended and actual military use to which it was put in Southeast Asia * * *."

The defendant, for its part, opposes each one of the plaintiff's four breach of implied-in-fact contract arguments on factual as well as legal grounds. In addition, the defendant asserts that the rationale surrounding the Government contractor defense supplies an independent legal basis for finding in its favor. Finally, although not pressed by the Government, since the plaintiff's contractual theories are all based on the concept of contractual indemnification, that matter also will be discussed in the concluding section of this opinion.

After full consideration of the parties' briefs and oral arguments, it is evident to the Court that only the plaintiff's fourth claim regarding the warranty of specification has any potential vitality. The first three claims bear superficial resemblance to viable implied-in-fact contract theories, but, upon closer inspection, they do not meet the requirements established in the appropriate preceden-

tial case law. However, in the interests of completeness, this Court will discuss each of the plaintiff's four contractual claims and defendant's responses to them.

A. *Plaintiff's Implied-In-Fact Contract Claims.*

1. The first three claims.

There is a line of cases which allows Government contractors to recover from the Government the unexpected increased costs of performance of a contract if the Government, at the time the contract was formed, had superior knowledge regarding difficulties in production which were not apparent and were not otherwise known by the contractor. *American Ship Bldg. Co. v. United States*, 228 Ct. Cl. 220, 654 F.2d 75 (1981); *Hardeman-Monier-Hutcherson v. United States*, 198 Ct. Cl. 472, 458 F.2d 1364 (1972); *J.A. Jones Constr. Co. v. United States*, 182 Ct. Cl. 615, 390 F.2d 886 (1968); *Helene Curtis Indus., Inc. v. United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963); *J.F. Shea Co. v. United States*, 4 Cl. Ct. 46 (1983).

From this precedent, the plaintiff argues that the Government is liable to the manufacturers of Agent Orange for their costs in defending and settling the suits brought against them by Vietnam veterans. This is because the Government allegedly knew more about the hazards of dioxin contained in the Agent Orange than did the herbicide manufacturers, and the Government breached its duty (contractual obligation) to reveal this superior knowledge to the plaintiff.

The defendant counters that the plaintiff and its predecessor were experienced manufacturers of 2,4,5-T, and they continued to manufacture 2,4,5-T commercial products the entire time the plaintiff was supplying Agent Orange to the United States. Also, they complied with the general reporting and registration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, 7

U.S.C. §§ 135 *et seq.* (1964) (FIFRA).[7] In view of this, the Government could reasonably assume that the plaintiff had tested its products as required by FIFRA and would be aware of potential hazards associated with 2,4,5-T.

While the determination of how much knowledge both the plaintiff and the Government had about the hazards of dioxin and Agent Orange is fact-intensive and not suitable for summary judgment, this Court believes it is not necessary to reach a decision on this factual issue. In analyzing these cases, it is clear to this Court that the doctrine of superior knowledge covers *only* unexpected costs in the *performance* of the contract. None of the cases cited by the plaintiff involving the doctrine of superior knowledge extend the doctrine beyond the production of the item contracted for, be it disinfectant powder (*Helene Curtis*) or the construction of a dock in Australia (*Hardeman—Monier—Hutcherson*. In all of the cases cited above, the Government knew about some non-obvious obstacle that anyone would encounter in trying to produce the contracted-for item. For example, in *Helene Curtis*, it was a new substance that needed grinding in order to mix properly into the disinfectant powder, and, in *Hardeman—Monier—Hutcherson*, it was severe weather conditions and water currents that made the dock much more difficult to construct.

The common thread is that, in all of these cases, the contractor had to spend more time or money on production than it anticipated when entering into the contract with the Government because of latent difficulties in the

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[7] In addition to the general reporting and registration requirements imposed by FIFRA, 7 U.S.C. § 135a, the act also requires manufacturers to test products prior to marketing them. Specifically, 7 C.F.R. § 162.106 (1949) requires that the manufacturer have the product thoroughly tested by experimenters, and if it is "likely to cause injury to human beings, or desirable plants or animals, its limitations from these standpoints should be determined and adequate cautions placed on the label."

manufacturing or construction process. Also, the Government, at the time of contract formation, had knowledge of the latent problems that would raise performance costs and did not divulge this knowledge to the contractors. Thus, citing to *Helene Curtis*, the United States Court of Claims in *American Ship Bldg. Co.*, 228 Ct. Cl. at 225, 654 F.2d at 79, stated that the four factors of the superior knowledge doctrine were:

> [W]here (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

To satisfy the requirements of the doctrine, the vital knowledge, which the Government possesses and the contractor does not, must be a fact that affects *performance costs or duration of performance*. In the case at hand, plaintiff does not claim that it had any unforseen problems in the manufacture of the Agent Orange which increased the costs of production or caused a delay in performance. Thus, the superior knowledge doctrine does not apply to plaintiff's claim and does not entitle it to recover costs that were not connected to actual *performance* under the contract, which was for the manufacture of the Agent Orange to the detailed Government specifications. *See generally, Lopez v. A.C. & S., Inc.* 858 F.2d 712, 717-18 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989). Prior case precedent simply does not allow the expansion of the doctrine of superior knowledge to be extended as far as the plaintiff apparently wants it to stretch. The time frame that the courts have found appropriate to review has always been the period of performance only—not some indefinite time stretching well into the future.

In its second and closely related theory, the plaintiff argues that, under basic contract principles, the Government had a duty to act in *good faith* and not increase the plaintiff's contract costs. *Petrofsky v. United States,* 222 Ct. Cl. 450, 616 F.2d 494 (1980), *cert. denied,* 450 U.S. 968 (1981); *Commerce Int'l Co. v. United States,* 167 Ct. Cl. 529, 338 F.2d 81 (1964). According to the plaintiff, the defendant breached this duty by failing to use Agent Orange in a safe manner and avoid potential health risks because the Government did not provide identification of the defoliant's active ingredients or give warnings concerning its proper use. Based on the Government's alleged failure to carry out these measures, plaintiff claims it is therefore entitled to reimbursement for the costs of the Agent Orange litigation as *increased costs of performance.*

The Government submits that there was no increase in the cost of performance since plaintiff fully performed the supply contracts at the agreed price. Also, the defendant avers there was no defect in the specification which could give rise to a claim of this type.

The Court finds that the Government has not breached its duty to act in good faith not to increase the cost of performance for basically the same reasons as discussed in the superior knowledge section above. This is another performance-related doctrine that will not be extended as a matter of law to assigning liability to a contracting party for matters that occur at some distant point in the future. The shoe simply does not fit. It is true that this Court has held that it is conceivable that third-party liabilities could be considered costs of performance at the time of entering the contracts. *Johns-Manville Corp. v. United States,* 13 Cl. Ct. 72, 161 (1987), *vacated on jurisdictional grounds,* 855 F.2d 1571 (Fed. Cir. 1988). However, we agree that:

> Judicial recognition has not been extended to the notion that a supply item produced according to speci-

> fications in a satisfactory manner, yet causing damages due to its use, can be the basis of a claim to recover damages as a cost of performance.

GAF Corp., 19 Cl. Ct. at 503. With this in mind, the Court will not further extend the outer limits of the plaintiff's good faith costs of performance implied-in-fact contract theory.

In its third theory, the plaintiff has likewise argued that the Government had a duty to exercise due care in *using* the plaintiff's product in order to avoid harming the plaintiff. According to the plaintiff, the Government breached this duty by mixing plaintiff's allegedly dioxin-free product with the dioxin-contaminated products of other manufacturers. Also, plaintiff avers that the Government again breached this duty by failing to provide adequate warning labels about the hazards of Agent Orange and forbidding the plaintiff to do so. Thus, plaintiff argues that, by mixing plaintiff's product with contaminated products and prohibiting warning labels, the Government subjected plaintiff to potential liability that did not exist previously.

As an aside, it is noted that the plaintiff continually refers to the Government as having various "duties" running to the plaintiff. It should also be noted in this connection that the Court has *contract* jurisdiction, and the concept of "duty" arises primarily in tort analysis. The Court, however, does not have jurisdiction over matters sounding in tort. 28 U.S.C. § 1491(a)(1) (1988). *Aetna Casualty and Sur. Co. v. United States*, 228 Ct. Cl. 146, 655 F.2d 1047 (1981). Although the plaintiff's arguments come perilously close to a jurisdictional block, the plaintiff's claims will be viewed as allegations of contractual obligations on the part of the Government to perform, or refrain from performing, in a certain way.

As the defendant has pointed out, the United States Court of Appeals for the Federal Circuit in *Lopez* rejected a claim similar to the plaintiff's, calling it "bizarre

and novel." As the court in *Lopez* has stated: "an implied warranty relating to the use by the buyer after delivery, and warranting it would not harm the seller is novel, and no reason is shown why anyone could have so supposed at the date of sale by any inference from the circumstances." *Id.*, 858 F.2d at 716. Defendant deems this a reverse warranty claim, and this seems an accurate portrayal.

Looking to the guidance of the Federal Circuit in *Lopez*, it is clear that this reverse warranty theory must be considered to be a contract implied-in-fact, if it exists at all. To establish a contract implied-in-fact, there must be factual circumstances which indicate that the parties have actually come to a meeting of the minds and taken upon themselves corresponding obligations and liabilities. *Hirschmann v. United States*, 11 Cl. Ct. 338, 342 (1986). Such a factual inference is not supported by any of the circumstances surrounding the sale of the Agent Orange by plaintiff to the Government.

While plaintiff may believe it is fairer to allocate the liability to the user of the product, this type of reverse warranty, based on fairness of risk allocation, is cognizable only as a quasi-contract implied-at-law, *Santisteven v. Dow Chem. Co.*, 506 F.2d 1216, 1219 (9th Cir. 1974). This Court is without jurisdiction to consider implied-in-law contracts. *United States v. Mitchell*, 463 U.S. 206, 218 (1983); *Lopez*, 858 F.2d at 714-15; *Hirschmann*, 11 Cl. Ct. at 342.

2. The plaintiff's warranty of specification claim.

In *United States v. Spearin*, 248 U.S. 132, 136-37 (1918), the Supreme Court held that the inclusion of detailed specifications in a contract prepared by the Government imported a warranty that, if the specifications were followed, the resulting product would be adequate, and the contractor would not be responsible for the consequences of defects in the specifications. This implied

warranty of specification has been recognized in many cases since *Spearin*. *See e.g., Ordnance Research, Inc. v. United States,* 221 Ct. Cl. 641, 609 F.2d 462 (1979); *Hol-Gar Mfg. Corp. v. United States,* 175 Ct. Cl. 518, 360 F.2d 634 (1966); *Blount Bros. Corp. v. United States,* 872 F.2d 1003 (Fed. Cir. 1989).

In *Spearin,* the defect became apparent due to damage that occurred during the performance of the contract. *Spearin,* 248 U.S. at 134-35. However, the warranty of specification is not limited to the time of performance, according to the holding in *Poorvu v. United States,* 190 Ct. Cl. 640, 420 F.2d 993 (1970). In that case, the defect in the specified construction method did not begin to manifest itself until some four years after the completion of the building, and the United States Court of Claims determined that the *Spearin* warranty of specification still operated to place the liability for the damage on the Government, which had dictated the construction specifications. *Poorvu,* 190 Ct. Cl. at 651, 420 F.2d at 1000.

Plaintiff argues that an implied-in-fact warranty of specification arose in this case because the Government supplied detailed specifications for Agent Orange to Hercules, and the plaintiff manufactured the defoliant in accordance with these detailed specifications. The warranty of specification means that the Government impliedly warranted that the item made to the precise specification would be safe and free from defects. Plaintiff claims that the Government breached this warranty because the plaintiff was subjected to tort suits by third parties who claimed they were injured by the Agent Orange the plaintiff manufactured.

The Government contends that plaintiff's claim is nearly identical to claims made by the asbestos manufacturers that, based on contract theories, attempted to recover from the United States costs they incurred as a result of suits brought by shipyard workers who were

exposed to asbestos dust from using insulating products. The asbestos manufacturers made these products in accordance with military specifications and sold them to the United States during the World War II era and thereafter. Accordingly, the defendant relies on two asbestos-related cases, *Lopez* and *GAF Corp.*, for its defensive position. The Government contends that these cases bar the plaintiff's warranty of specification claim on the grounds that the factual circumstances of this case do not support finding an implied-in-fact agreement, a meeting of the minds, and this Court lacks jurisdiction over contracts that are implied at law. *Lopez*, 858 F.2d at 714-15; *GAF Corp.*, 932 F.2d at 950.

For a warranty to be implied in fact, the plaintiff must demonstrate that "the circumstances strongly supported a factual inference that a warranty was implied." *Lopez*, 858 F.2d at 715. Such an inference arises only when the Government specifications told the contractor "just how to do the job", *Id.* at 716, and not when they merely specified some certain characteristic in the contracted-for product. *GAF Corp.*, 932 F.2d at 950. With respect to the claims of breach of warranty of specification, the Court agrees with the plaintiff that the underlying bases of the decisions in *Lopez* and *GAF Corp.* were that the asbestos companies knew about the dangers of their products before entering into the contracts with the Government and that the products manufactured under the Government contracts did not differ materially from those already sold commercially. Thus, there was no basis for finding a factual inference that the specifications constituted an "extensive Government intrusion into the asbestos production process which might suggest that the Government intended to warrant the product's safety." *GAF Corp.*, 932 F.2d at 950.

Plaintiff argues that, in this case, there exists the extensive Government intrusion into the Agent Orange production process that suggests that the Government intended to warrant the product's safety. Also, the plain-

tiff alleges that it is unlike the asbestos manufacturers because it knew less than the Government did about the defoliant, and Agent Orange differed materially from the products plaintiff sold commercially.

However, even assuming that a warranty of specification arose from the Government's detailed specifications for Agent Orange, there must be more than the mere existence of a warranty to entitle the plaintiff to recover against the Government. Plaintiff must also show that this warranty was *breached* by the Government and that this breach caused plaintiff to suffer the type of damages recoverable in contract. It is on these requirements, breach and contract damages, that the plaintiff has failed to state a case that can withstand the Government's summary judgment motion.

Turning again to *Spearin* and its progeny, the implied warranty of specification was breached when the product, made in accordance with the detailed specification created by the Government, was inadequate, and the inadequacy clearly caused some damage. In *Spearin*, the sewer was inadequate due to a problem with a blocked sewer pipe in the existing system; the new pipe broke, and the sewer overflowed and damaged the dry dock that the contractor was building for the Government. *Id.*, 248 U.S. at 134. In *Poorvu*, the parking area for a building was constructed with inadequate support below it, in accordance with the Government's specifications. This caused the parking area to settle and put pressure on water pipes that were located beneath it. These pipes broke, and the water spilling from them saturated the ground under the building, which then weakened the support under the building, causing it to settle severely into the ground. *Id.*, 190 Ct. Cl. at 646-47, 420 F.2d at 997.

In these cases, it is clear that the specification was inadequate, and the resulting defect in the finished product caused obvious and direct damage. The courts in these cases appeared to analyze these situations by de-

termining first, whether or not some damage had occurred, and second, whether or not the specification written by the Government was defective. If these two circumstances were present, the courts then determined which party should bear the risk of the faulty specification causing the damage. The implied warranty of specification is the method by which the court can allocate the risk of the faulty specification to the Government, which created the specification, rather than to the contractor, who actually built the defective item that caused the damage. *See* JOHN C. CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 199-202 (2d ed. 1985). As stated in *Spearin*, 248 U.S. at 136, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." Also, the court held in *Poorvu* that "the government must answer for damage incurred because of inadequate plans it has furnished." *Id.*, 190 Ct. Cl. at 651, 420 F.2d at 1000.

In this case, plaintiff asserts that the Government designed faulty specifications for Agent Orange because dioxin contaminated the specified defoliant product. The damage plaintiff claims as a result of the faulty specification is, however, the settlement costs it incurred when veterans claimed they were injured by the dioxin in the Agent Orange used for military purposes in Vietnam. Thus, the plaintiff claims that the Government breached the warranty by subjecting the chemical manufacturer to tort liability running to third parties who were injured by the Government's use of the Agent Orange manufactured by the plaintiff. However, for several reasons, the plaintiff cannot prove that it was actually subjected to tort liability by third parties because of its manufacture of Agent Orange for the Government's military use. First, dioxin has never been scientifically proven to cause the injuries that the veterans alleged, and second, the plaintiff was protected from liability to the veterans in

any event under the Government contractor defense, which is discussed later in this opinion. Thus, to the extent that the warranty of specification does exist in this case, there has been no breach of the implied warranty of specification because the alleged defect in the herbicide has never been proven, and the plaintiff would not have been liable to third parties even if the specifications had been defective due to the Government contractor defense.

It is clear to this Court, after reviewing the many and varied decisions regarding the veterans' suits against the herbicide manufacturers, that Agent Orange and dioxin have never been proven to cause the injuries claimed by the veterans. As stated in the *Settlement Opinion*, "the result of an enormous scientific effort to be helpful on causation has, from the plaintiffs' point of view, left the case at best open. This is not sufficient to support a recovery in tort law * * *." *Id.*, 597 F.Supp. at 795. Likewise, when the claims of the veterans who opted out of the class went forward after the settlement of the class action, the United States District Court for the Eastern District of New York granted summary judgment to the chemical manufacturers (including Hercules) and noted that "years of discovery and tens of millions of dollars spent by the government and others on research has not yielded any competent evidence indicating a genuine issue of fact about causation." *Opt-Out Opinion*, 611 F.Supp. at 1260. Thus, plaintiff cannot show that it has been held liable to a third party for damages caused by a defect in the herbicide it produced for the Government under detailed specifications.

As for damages arising from contract breaches, it is axiomatic that such damages are limited to those that were reasonably foreseeable at the time the parties formed the contract. *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). In *Northern Helex Co. v. United States*, 207 Ct. Cl. 862, 888, 524 F.2d 707, 721 (1975), *cert. denied*, 429 U.S. 866 (1976), the court reviewed the rules governing damages for breach of contract and

concluded that the authorities support denial of claims where "costs are too remote, speculative, and consequential to be compensable as damages." In this case, it is apparent that the costs (damages) plaintiff incurred by defending and settling a lawsuit brought by veterans, who were never able to prove that the plaintiff's product injured them, were not reasonably foreseeable at the time the contract was formed between the Government and the plaintiff.

Plaintiff urges that there is a strong judicial policy favoring settlements and the fact that it settled the underlying case, rather than litigating the issue of its liability to the veterans, should not count against plaintiff in its attempt to recover from the Government for breach of warranty. It is true that settlements are encouraged. *See e.g., Ahern v. Central Pac. Freight Lines,* 846 F.2d 47, 48 (9th Cir. 1988); *Janneh v. GAF Corp.,* 887 F.2d 432, 435 (2d Cir. 1989). However, the cases plaintiff cites regarding the recovery of settlements paid to third parties involve indemnification agreements, either implied-in-fact or implied at law. *Travelers Ins. Co. v. United States,* 493 F.2d 881 (3d Cir. 1974); *Parfait v. Jahncke Serv., Inc.,* 484 F.2d 296 (5th Cir. 1973), *cert. denied,* 415 U.S. 957 (1974). As noted earlier, this Court does not have jurisdiction over contracts implied at law. *United States v. Mitchell,* 463 U.S. at 218. As for an implied-in-fact contract, the factual circumstances do not support one because it simply was not foreseeable to the parties that the Agent Orange class action settlement would come to pass more than a decade after the contracts to supply the defoliant were formed. The facts may support an implied warranty of specifications, but they cannot be stretched so far as to support the theory that the parties came to a meeting of the minds that there would be an indemnification agreement between them if the implied warranty of specification was alleged, but never proven, to be violated.

As for plaintiff's claim of attorney fees, the court in *Kania v. United States*, 227 Ct. Cl. 458, 467, 650 F.2d 264, 269, *cert. denied*, 454 U.S. 895 (1981), noted that "jurisdiction to award counsel fees and other litigation expenses as an element of breach damages would be extremely dubious. It is the kind of consequential damages not normally awarded in contract breach cases." *Also see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Overall, "[c]ourts do not, in awarding breach damages, follow through the remote indirect consequences of the breach as distinguished from those directly in contemplation when the contract was made." *Kania*, 227 Ct. Cl. at 467, 650 F.2d at 269. Thus, plaintiff cannot support a contention that it suffered compensable damages to the amount of its legal fees and costs as a result of the Government's alleged breach of the implied warranty of specification.

Finally, the question remains as to whether plaintiff could ever have been found liable to third parties, even if causation between Agent Orange and veterans' injuries had been proven. The Government contractor defense would certainly present a serious obstacle to a manufacturer's liability to military service personnel for defects in products made to Government specifications for military applications. *See Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977); and *Feres v. United States*, 340 U.S. 135 (1950). The Government contractor defense will be discussed more fully in a later section of this opinion, but its impact on any liability the plaintiff would have to third parties must be noted at this juncture. The plaintiff asserts, in its arguments involving superior knowledge, that it manufactured the product to detailed specifications and lacked the knowledge it alleges the Government had regarding the hazards of Agent Orange. If this is true, then the plaintiff would avoid liability to third parties based on the Government contractor defense. *Boyle*, 487 U.S. at 512. The plaintiff had

an absolute defense. Plaintiff was well aware of this strong defense before it agreed to settle the claims of the veterans because, in 1983, it was granted summary judgment in its favor on the basis of the Government contractor defense, *Agent Orange,* 565 F.Supp. at 1275, even though plaintiff was later brought back into the case. Thus, in addition to the reasons already discussed above, there was no breach of the warranty of specification based on the manufacturer's tort liability to third parties supposedly injured by the product because the manufacturer, under the circumstances alleged, was protected from liability by the Government contractor defense.

After consideration of all of the plaintiff's contractual arguments, it is apparent that most of the theories plaintiff advanced do not apply to hold the Government liable for the amount paid in connection with the settlement of the class action suit. The warranty of specification might apply to the Government based on the detailed specification for the production of Agent Orange. However, plaintiff has failed to come forth with the required quantum of proof regarding the breach of this warranty and the contract damages flowing therefrom. Thus, the moving party is entitled to summary judgment because the nonmoving party, the plaintiff, has "failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex v. Catrett,* 477 U.S. at 323.

B. *The Government Contractor Defense*

Even if this Court is in error when it finds no breach and no damages as a matter of law in this case, the plaintiff would still not be able to recover in this action because of the Government contractor defense and the law in regard to contract indemnification. Defendant alleges that, regardless of the resolution of the contractual issues in this matter, the Government contractor defense provides a *separate* and *independent* basis for a denial of

plaintiff's claims. Based on the policies underlying the Government contractor defense, the defendant states that the plaintiff cannot be allowed to recover indirectly through this contract suit for reimbursement what the veterans could not recover directly against the Government under the Federal Tort Claims Act, 28 U.S.C. § 2671-80 (1988) (FTCA), i.e., tort damages from the Government payable to military personnel for injuries allegedly sustained while serving on active duty.

Plaintiff counters that the Government contractor defense was not settled law at the time of the settlement with the veterans in the class action suit, so there was the possibility that it might have been held liable to the veterans for billions of dollars. Thus, their decision to settle was very reasonable in the face of the possibility of massive liability. Also, plaintiff argues that the Government, in a brief it filed, argued against the application of the Government contractor defense to shield the herbicide manufacturers from liability, and thus it is estopped from urging its application here.

While the Government contractor defense is certainly important to the resolution of the issues in this case, both parties have neglected to consider crucial matters in support of their respective arguments. What is primarily at issue in this case is the *Government's liability* to the plaintiff under these circumstances, not just the plaintiff's liability to the veterans. Fortunately, this issue has already been considered by the Supreme Court in *Stencel*, and this Court will follow its clear guidance in the instant case.

In *Stencel*, a serviceman, who was injured when the ejection system of his fighter aircraft malfunctioned, brought a product liability damage action against the manufacturer, Stencel, and the United States. Stencel cross-claimed against the Government for indemnity claiming that any malfunction in the system was due to faulty Government specifications and components. Based on the earlier *Feres*

case, the Supreme Court upheld the district court's grant of summary judgment for both the Government and Stencel against the serviceman and also upheld the dismissal of Stencel's cross-claim against the Government.

In the *Feres* case, the Supreme Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the FTCA. *Id.*, 340 U.S. at 146. The Supreme Court in *Stencel* reviewed the *Feres* decision and concluded that it rested on three factors. First, the Supreme Court found that the relationship between the Government and its military personnel is distinctively federal in character, and, thus, it would not make sense to have the liability of the Government to an injured serviceman depend on the law of the place where the injury occurred. Second, the Supreme Court determined that the statutory compensation scheme, which provides pensions and medical services to injured servicemen without regard to any negligence by the Government, stands as a legal substitute for allowing the Government to be sued in tort for negligence. Third and finally, the Supreme Court concluded that military discipline and the relationship between a soldier and his superiors, which has no counterpart in civilian affairs, might be distorted by the imposition of tort liability. *Stencel,* 431 U.S. at 671-72.

In the case of the contractor suing the Government, the Supreme Court determined that the same factors were relevant and that it must "consider the impact of these factors where, as here, the suit against the Government is not brought by the serviceman himself, but by a third party seeking indemnity for any damages it may be required to pay the serviceman." *Id.*, 431 U.S. at 672. The first factor, the application of federal rather than state law, and the third factor, the effect of tort liability on military discipline, operated with equal force in suits by the serviceman and suits by the contractor. *Id.*, 431 U.S. at 672-73. The second factor, the existence of the military

compensation scheme, the Supreme Court found more difficult to apply in the case of the contractor suing to recover funds it had paid the serviceman. However, it concluded that the compensation scheme served the dual purpose of providing an efficient remedy for the injured serviceman and also protected the Government through its limitation of liability provisions which provide an upper limit on the Government's liability for service-connected injuries. *Id.*, 431 U.S. at 673. Thus, in *Stencel*, 431 U.S. at 673, the Supreme Court determined that:

> To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: "To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." [Citations omitted, alterations and omissions in original.]

Therefore, the contractor was not allowed to recover from the Government where the underlying claim for which the contractor was seeking indemnity was made by an injured serviceman. In conclusion, the Court observed that "[s]ince the relationship between the United States and [the contractor] is based on a commercial contract, there is no basis for a claim of unfairness in this result." *Id.*, 431 U.S. at 674.

The situation analyzed in *Stencel*, a contractor seeking indemnity from the United States for claims made by an injured serviceman, is analogous to plaintiff's claim in this case. Plaintiff in this action is seeking repayment from the Government of amounts it paid to injured military service personnel based on the Government's provision of specifications for the product which allegedly harmed the military service personnel. While in its later briefs plaintiff has shied away from its request for con-

tractual indemnification, perhaps to avoid the application of the *Stencel* case, it is clear that indemnity is what plaintiff seeks regardless of the title plaintiff applies to it. BLACK'S LAW DICTIONARY 769 (6th ed. 1990) defines indemnity as "reimbursement." Reimbursement of the amounts it paid in settlement and legal fees is what plaintiff requests here, and, thus, the strictures of the *Stencel* case apply and foreclose plaintiff's claim that the Government must reimburse it for its costs and fees in connection with the Agent Orange litigation. This suit by the plaintiff is a "back door" attempt to recover from the Government what the *Feres* doctrine blocked at the front door; that is, damages for injuries suffered by servicepersons in the line of duty. Accordingly, the rationale of *Stencel* requires this Court to deny the plaintiff's claim.

The reasoning of *Feres* and *Stencel* was later amplified and extended by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which involved an action between private parties but implicated the Federal Government's interests. In *Boyle*, a United States Marine co-pilot was killed when his helicopter crashed into the water during a training exercise. Although the Marine survived the impact, he was unable to escape from the submerged helicopter and drowned. Based on state tort law, the Marine co-pilot's estate sued the Government contractor that built the helicopter, claiming that the escape hatch was designed negligently because it opened outwards and was unusable when the helicopter was under water, due to the pressure of the water outside the submerged craft. The Government contractor (United Technologies) contended that it made the escape hatch to the precise specifications required by its contract with the Government and therefore was not liable under state tort law.

Even though it was a state law tort suit between private parties, the Supreme Court found that "the Federal Government's interest in the procurement of equipment

is implicated by suits such as the present one—even though the dispute is one between private parties." *Id.*, 487 U.S. at 506. Thus, federal law could possibly apply. However, for federal law to displace state tort law, there must be a significant conflict between a federal policy and the operation of the state tort law. *Id.*, 487 U.S. at 507. Looking at the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1988) (FTCA), the Supreme Court identified a provision that suggested the outlines of a significant conflict between federal interests and state tort law in the area of Government procurement. While the FTCA authorized suits against the Government for harm caused by the negligent or wrongful conduct of Government employees in certain circumstances, it specifically excepted from consent to suit any claims based on the exercise of a discretionary function by a federal agency or employee, 28 U.S.C. § 2680(a) (1988). *Boyle*, 487 U.S. at 511. The Court determined that:

> [T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. If often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments * * * through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. [Citations omitted.]

Id. Thus, the state law, which would hold the Government contractor liable for design defects in military equipment, is displaced by the federal policy and law of deferring to military discretion in the procurement of military equipment embodied in the FTCA.

The Supreme Court in *Boyle* adopted a three-part test to determine when, to avoid conflict with the discretionary

function exception, displacement of state law is appropriate. It stated:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id., 487 U.S. at 512. If the contractor satisfies this test, then it is not subject to tort liability under state law for defects in equipment it manufactured for the military in conformance with precise specifications provided by the Government. This is because such liability would infringe on the discretionary function exception to the FTCA by allowing a state court to second-guess indirectly the Government's judgment in the selection of the appropriate design for military equipment.

The defendant argues here that the plaintiff's Tucker Act claim for contractual damages, just like a state court tort suit, is an attempt to have the judiciary second-guess the Government's decision to procure and employ Agent Orange. The defendant claims that this flies in the face of the Government contractor defense and the discretionary function exception and that it does violence to the policy of Government discretion in military procurement which these doctrines protect. Thus, based on the policies underlying the Government contractor defense, the defendant contends that the plaintiff is barred from recovery on its Tucker Act claim.

The Government contractor defense is important to the instant case for two reasons. First, its underlying policies, as expressed in *Boyle*, are to protect the discretion of the Government in procuring military equipment, as mandated by the discretionary function exception to the FTCA. Therefore, this Court must determine whether

these policies apply equally to suits by contractors against the Government as they do to suits by injured military personnel against the contractor, which *Boyle* addressed specifically. Second, this Court must consider whether the Government contractor defense operated in the suits plaintiff faced and provided plaintiff with such a strong defense that it is without grounds to claim that it was actually in grave danger of being held liable to third parties in tort for injuries stemming from the product it produced for the Government.

This Court agrees with the defendant's argument that the policies supporting the *Boyle* decision apply with equal force to an attempt by a Government contractor to sue the Government directly. The Supreme Court in *Boyle* was concerned with preserving the discretion of the military in choosing the appropriate design for military equipment because this choice involves balancing many conflicting considerations, including the trade-off between safety and combat effectiveness. *Id.*, 487 U.S. at 511. The exact same discretion and balancing by the Government is implicated in the case at issue. The Government procured Agent Orange to serve military needs in Vietnam. The product was designed and used to save American soldiers' lives by eliminating possible hiding places for the Viet Cong and North Vietnamese troops. Trade-offs between the effectiveness of Agent Orange and its safety were a necessary part of the Government's procurement and design activities. This Court agrees with Chief Judge Weinstein, who found that "[t]he information available makes it clear that the government would have concluded that the beneficial saving of American soldiers' lives by defoliating the Vietnamese jungles far outweighed any minimal risks to our own or allied troops posed by exposure to Agent Orange." *Opt-Out Opinion*, 611 F. Supp. at 1263-64. As another court has noted, "[i]t is this sort of balancing which the *Boyle* defense protects, by providing for contractor immunity where state tort law would hold the contractors liable for

injuries resulting from the government's design deficiencies." *In re Aircraft Crash Litig.*, 752 F. Supp. 1326, 1370 (S.D. Ohio 1990), *aff'd without op.*, 935 F.2d 269 (6th Cir. 1991). Thus, this Court will heed the warning in *Boyle*, 487 U.S. at 511, and not second-guess military procurement decisions made by the Government in the guise of allowing the plaintiff contractor to recover from the Government payments made to injured service persons. Also, this Court will not restructure the United States' immunity and consent to tort suits, which is specified by the FTCA and its exception for discretionary functions, through the vehicle of a contract claim based on tort damages, especially in light of the expansion of immunity clearly manifested in *Boyle*. *Lopez*, 858 F.2d at 718.

Plaintiff submits that *Boyle* was several years subsequent to the settlement in this case in 1984, and that, in 1984, the application of the Government contractor defense was at best, uncertain. In effect, plaintiff argues that *Boyle* created a new doctrine and that it should not be applied retroactively. This raises the second reason for consideration of the Government contractor defense; namely, its availability to the plaintiff as a defense in the state tort suits it faced. The defendant contends that the plaintiff would never have been required to pay the veterans for their alleged injuries because, as a Government contractor, the plaintiff was completely protected by the Government contractor defense. The Government notes that plaintiff was, in fact, granted summary judgment earlier against the opt-out claimants in view of the Government contractor defense in the district court, *Opt-Out Opinion*, 611 F. Supp. at 1263-64. Also, the United States Court of Appeals for the Second Circuit affirmed on this basis, because "[s]ubjecting military contractors to full tort liability would inject the judicial branch into political and military decisions that are beyond its constitutional authority and constitutional competence." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 191.

Plaintiff argues that it is unfair to retroactively apply *Boyle,* which was decided in 1988, to the issues plaintiff faced at the time of the settlement in 1984. However, this Court is not applying *Boyle* retroactively. The Government contractor defense existed long before *Boyle. See Yearsley v. W.A. Ross Constr. Co.,* 309 U.S. 18 (1940). Instead, using *Boyle* as a guide, this Court is applying the holdings of *Feres* (1950) and *Stencel* (1977), as discussed earlier, and the discretionary function exception to the FTCA, to the issues presented in this case. *Feres, Stencel,* and the FTCA were all operative at the time of the settlement in 1984 and would have barred a military contractor's tort liability to injured military service personnel. In fact, the defense was fully discussed by Judge Pratt in his 1983 decision, which granted the plaintiff's motion for summary judgment and allowed the plaintiff to be removed from the *Settlement* case based on the operation of the Government contractor defense. *Agent Orange,* 565 F. Supp. at 1265. Thus, the later decision in *Boyle* did not chart a new course for Government contractors. It merely enunciated and clarified the Government contractor defense which already existed.

As a final note, plaintiff also argues that the Government has taken inconsistent positions, by opposing the Government contractor defense in the district court and supporting it in this case. Plaintiff claims that the Government should be be estopped from asserting a different position in this case than it took in the earlier case in which it filed the brief. However, plaintiff has not argued this point fully, and it should suffice to note that under *Office of Personnel Management v. Richmond,* 496 U.S. 414 (1990), it is unlikely that estoppel will be found against the Government without a showing of fraud or affirmative misconduct by the Government. *Heckler v. Community Health Serv.,* 467 U.S. 51, 67 (1984); *Schweiker v. Hansen,* 450 U.S. 785, 788-89 (1981); *Jana, Inc. v. United States,* 936 F.2d 1265, 1270 (Fed.

Cir. 1991), *cert. denied,* 116 L. Ed. 2d 775 (1992); *Bolt v. United States,* 944 F.2d 603, 609 (9th Cir. 1991); *Portmann v. United States,* 674 F.2d 1155, 1164 (7th Cir. 1982); *People's Bank & Trust Co. v. United States,* 7 Cl. Ct. 665, 668-69 (1985). No such fraud or affirmative misconduct has been shown or even alleged here, and, thus, this Court finds no grounds for estoppel.

C. *Contract Indemnification*

Plaintiff asserts in all four of its contractual claims that it is entitled to "contractual indemnification." The exact bases for these claims are unclear, and it appears that these claims are actually allegations made for the purpose of proving damages due to the breach of the warranty of specification which have already been addressed. Nevertheless, plaintiff's indemnification claims will be resolved separately.

For contractual indemnification to exist and to be actionable in this Court, it must arise from an express or implied-in-fact contract term involved here. There is, of course, no express contract indemnification term. However, even if this Court were to assume, which it does not, that such an implied-in-fact contract term arose from the dealings between the parties, the term itself could not operate to bind the Government. It is clear that the United States cannot be bound by a contract, or a term within a contract, into which its agents were without the legal authority to enter. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947). This principal applies regardless of whether or not the contract is express or implied. *Sutton v. United States,* 256 U.S. 575, 580 (1921). However, the plaintiff cannot show that the agent of the Government had the authority to enter a binding indemnification agreement because, for indemnity to exist, there must be either a prior appropriation to cover the possible costs of indemnity and/or a statutory exception to this rule permitting such payments. *See Matter of: Assumption by Government of Contractor Liability to Third Per-*

sons—Reconsideration, 62 Comp. Gen. 361 (1983). This is because an unfunded or unexcepted indemnification term would violate the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988), which bars a federal agency from entering into a contract for future payments in excess of an existing appropriation. The Act states, in pertinent part, that officers or employees of the United States may not:

> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341 (1988).

Thus, in *California-Pacific Util. Co. v. United States,* 194 Ct. Cl. 703 (1971), the Court of Claims dismissed an indemnification claim brought by a utility company seeking to recover amounts paid in settlement to a federal employee injured by one of its electric poles. The Court stated that:

> The United States Supreme Court, the Court of Claims, and the Comptroller General have consistently held that absent an express provision in an appropriation for reimbursement adequate to make such payment, [the Anti-Deficiency Act] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated.

Id., 194 Ct. Cl. at 715.

In the present case, plaintiff presents no appropriation or statutory exemption which would authorize indemnification in this case. Thus, even if an implied indemnification agreement existed, it would be unenforceable under the Anti-Deficiency Act. Therefore, the plaintiff has no grounds for recovery on any contractual indemnification theory.

In final summary, the plaintiff has failed to convince this Court that it can recover on any one of its four implied-in-fact contract theories. Further, even if any one of its four contract theories could be found to be factually supportable, the plaintiff would still lose this lawsuit because of the application of the Government contractor defense to the undisputed facts and/or the application of the Anti-Deficiency Act bar to any recovery in indemnification by contract.

CONCLUSION

For the reasons stated above, the defendant's motion for summary judgment is granted, and the complaint is to be dismissed.

Costs to the prevailing party.

IN THE UNITED STATES CLAIMS COURT

No. 90-496 C

HERCULES INCORPORATED

v.

THE UNITED STATES

JUDGMENT

Filed Apr. 2, 1992

Pursuant to the opinion of April 2, 1992,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. Costs to the prevailing party.

DAVID A. LAMPEN
Clerk of Court

April 2, 1992

By: /s/ Linda A. Elgin
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

IN THE UNITED STATES CLAIMS COURT

No. 90-391C

(Filed: Apr. 22, 1992)

WM. T. THOMPSON COMPANY,
a Missouri Corporation

v.

THE UNITED STATES

Contracts; Agent Orange; implied-in-fact contract terms; Government contractor defense; indemnification; Defense Production Act of 1950, 50 U.S.C. app. §§ 2061, 2157 (1988).

OPINION

Yock, *Judge.*

This contractual dispute is before the Court on the parties' cross-motions for summary judgment, filed pursuant to USCC Rule 56.[1] For the reasons stated herein, the defendant's motion for summary judgment is granted, and the plaintiff's complaint will be dismissed.

Facts

Plaintiff, Wm. T. Thompson Company (Thompson), was a manufacturer in the mid to late 1960's of a prod-

[1] Defendant has, in the alternative, moved to dismiss pursuant to USCC Rule 12.

uct known as Agent Orange, which was used for military purposes by the United States Government as a defoliant during the Vietnam War. Years later, Vietnam veterans and their families, alleging that exposure to Agent Orange caused death, injuries, and birth defects, sued all the Agent Orange manufacturers, including Thompson. This multi-district product liability tort suit was settled before trial, *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter "*Settlement Opinion*"), 597 F. Supp. 740 (E.D. N.Y. 1984), *aff'd,* 818 F.2d 145 (2d Cir. 1987), *cert. denied,* 484 U.S. 1004 (1988), and Thompson was required to pay $3,096,597.22 of the total settlement amount. The instant contract suit was brought by Thompson in an attempt to recover from the United States Government the costs it incurred in defending and settling the suit in the district court.

The following facts are essentially uncontroverted: Agent Orange is a mixture of two phenoxy herbicides, 2,4-Dichlorophenoxyacetic Acid (2,4-D), and 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T) in a 50/50 blend. Depending on the process utilized, when 2,4,5-T is produced, it may contain varying amounts of 2,3,7,8 Tetrachlorodibenzo-p-dioxin (dioxin), a toxic substance, although not a key ingredient of either Agent Orange or 2,4,5-T.[2]

As one court noted, "the government and the military had a considerable amount of knowledge about 2,4,5-T, about dioxin, and about the hazards associated with both." *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter "*Agent Orange*"), 565 F. Supp. 1263, 1266 (E.D. N.Y. 1983). This knowledge extended back into the 1950's, and the level of knowledge increased rapidly during the mid to late 1960's. Much of the Government's knowledge was classified and not shared with the chemical com-

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[2] **While it has not been proven scientifically or legally, the Vietnam veterans believed that exposure to Agent Orange caused cancer and birth defects, and these were allegedly caused by the dioxin present in this defoliant.**

panies. *Id.* at 1267-68. However, some of the bigger chemical companies that were producing Agent Orange for the military did develop a considerable amount of knowledge about the dangers associated with the production of 2,4,5-T and the dioxin contained therein during this same time frame.

Thompson began producing phenoxy herbicides that contained 2,4,5-T by itself, or in a mixture with 2,4-D, in the early 1950's and continued to market these herbicides in the early 1960's. In 1961, the Government began to use a variety of phenoxy herbicides in Southeast Asia to defoliate trees and plant life to eliminate possible hiding places for the Viet Cong and the North Vietnamese troops.[3]

As the Vietnam War progressed, the military needed greater amounts of Agent Orange, but Thompson declined to bid for the contracts. As summarized by another court, the Government was not deterred, and:

> Acting under appropriate statutory authority, The Defense Production Act of 1950, Sept. 8, 1950, ch. 932, 64 Stat. 798, amended, June 30, 1966, 80 Stat. 235 (current version at 50 U.S.C. App. §§ 2061 *et seq.*) however, the government required Thompson to supply Agent Orange pursuant to two contracts dated April 19, 1967 and May 24, 1968. It supplied 333,685 gallons between September 1967 and January 1969. As reflected in test results, the dioxin content of its product ranged from .1 to .3 [parts per million].

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[3] **The defoliant Agent Orange and Thompson's commercial herbicides were of different concentrations and were applied differently. Agent Orange contained roughly two or four times as much 2,4,5,-T per gallon as most of the Thompson herbicides. Also, the Government used Agent Orange undiluted and sprayed at a rate of 3 gallons per acre, as compared to the dilution of Thompson's herbicide at a ratio of 100 to 1, sprayed at a rate of 1 gallon per acre.**

Agent Orange, 565 F. Supp. at 1272. The two contracts specified the formula for producing Agent Orange, and Thompson provided no input to the Government with respect to either the development or modification of the specifications, and the company strictly complied with the specifications. Regarding the possible hazards to users of Agent Orange, it appears that "the government's level of knowledge greatly exceeded that of Thompson in 1967." *Id.* at 1273. In March of 1967, the Government ordered Thompson to accelerate production of Agent Orange, and Thompson complied.[4] Thompson's total production was approximately two percent of all of the Agent Orange manufactured for use in Vietnam.

Some years later, starting in 1979, Vietnam veterans, or their estates, began filing negligence and strict liability tort actions against the chemical companies that produced Agent Orange for the Government. According to these plaintiffs, in view of the toxicity of dioxin, exposure to the Agent Orange that contained dioxin caused cancer, miscarriages, and birth defects. These actions were consolidated in the Eastern District of New York under the heading MDL No. 381.

On May 20, 1983, Thompson was granted summary judgment on its Government contractor defense, based upon the district court's finding that there was no evidence that Thompson had knowledge of hazards to users of Agent Orange and that the "government's level of knowledge greatly exceeded that of Thompson in 1967." *Agent Orange*, 565 F. Supp. at 1273. Unfortunately for Thompson, the granting of summary judgment was reversed by the succeeding district court judge approximately five months later, and Thompson was again made part of the litigation, along with all the other manufacturers of Agent Orange.

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[4] Plaintiff alleges that the Government's method for accelerating production, increasing the temperature during processing, caused an increase in the amount of dioxin contamination.

On May 7, 1984, the date trial was to begin, the parties reached a settlement, and a $180 million settlement fund was created. *Settlement Opinion*, 597 F. Supp. at 748. The district court judge weighing the potential costs as well as the uncertainties associated with trial for both sides, found that the proposed settlement was fair, reasonable, and adequate. However, he did note that plaintiffs *had never* produced any persuasive evidence showing a causal relationship between the exposure to small quantities of dioxin found in Agent Orange and the claimed injuries. *Id.*, 597 F. Supp. at 782-95. The district court's settlement opinion was affirmed, and the appeals court noted that it was "essentially a settlement at nuisance value," based on the "grave weaknesses in plaintiffs' case," since "the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent Orange * * *." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 171, 174 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Thompson's share of the settlement was $3,096,597.22, which it paid into the settlement fund in June, 1984. According to Thompson, it also spent approximately $3 million in legal fees during the Agent Orange litigation.

Nearly 300 plaintiffs had previously opted out of the class action suit and thus were not bound by the May, 1984 settlement. Thompson and other Agent Orange manufacturers successfully moved for summary judgment against these remaining plaintiffs. *In re "Agent Orange" Prod. Liab. Litig.* (hereinafter *"Opt-out Opinion"*), 611 F. Supp. 1223 (E.D. N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The district court judge found that (1) plaintiffs failed to present credible evidence as to causation, and that (2) the plaintiffs' claims were barred by the Government contractor defense.[5] *Id.*, 611 F. Supp. at 1229, 1258-63.

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[5] The court also found that no individual plaintiff could prove which defendant chemical company had manufactured the Agent Orange to which he allegedly had been exposed.

The appeals court affirmed, based upon the Government contractor defense, and also agreed that "the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam * * *." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 190 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

The plaintiff filed its complaint with this Court on May 7, 1990 and amended it on October 23, 1990. According to Thompson, the Government breached its duty to disclose its superior knowledge regarding the health risks of Agent Orange. Additionally, Thompson submits that the Government violated its implied warranty that the Agent Orange it required Thompson to manufacture based on detailed specifications would be safe and free from defects. Finally, Thompson alleges that the Government breached an implied contractual duty to indemnify Thompson for losses arising from the Government's requirement that Thompson produce Agent Orange.[6] The Government filed a Motion To Dismiss or, in the Alternative, for Summary Judgment on November 20, 1990, seeking dismissal of the suit as a matter of law. Thompson filed a Cross-Motion for Summary Judgment on February 19, 1991, on the grounds that the law and the uncontested material facts dictate a finding that the United States Government is liable to Thompson.

Discussion

"Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law." *GAF Corp. v. United States*, 19 Cl. Ct. 490, 496 (1990), *aff'd*, 932 F.2d 947 (Fed. Cir. 1991), *cert. denied*, 117 L. Ed. 2d 131 (1992). The substantive law involved

[6] **While plaintiff's amended complaint included a constitutional taking claim, the defendant is correct in noting that, since plaintiff has made no further mention of this claim, it must be considered abandoned. Thus, it will be dismissed.**

in the suit determines which facts are material, and only disputes over material facts, those which might affect the outcome of the suit under the governing law, may properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over facts that are not relevant under the controlling law will not prevent the entry of summary judgment. *Id.* The moving party, in this case the defendant, has the burden of establishing that there are no genuine issues of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986), and that it is entitled to judgment as a matter of law. *GAF Corp.*, 19 Cl. Ct. at 496. For the following reasons, this Court finds that the Government has met its burden of establishing that there are no genuine material issues of fact in dispute and that it is entitled to judgment as a matter of law.

In its complaint, the plaintiff has alleged that it is entitled to reimbursement from the Government under three counts. All three counts are based on alleged breaches of implied-in-fact contract obligations. Plaintiff submits that it produced Agent Orange in the 1960's under written contracts with the Government that contained detailed design specifications developed solely by the Government. It contends further that it had no part in the development of the specifications, that it manufactured the Agent Orange to the exact specifications ordered by the Government, and that it had little, if any, knowledge about the potential hazards that were inherent in the product as produced and used by the Government. Given these factual circumstances, the plaintiff argues that it is entitled to indemnification in contract for the losses it incurred in defending against and settling the tort suits brought by the Vietnam veterans and their families against the manufacturers of Agent Orange. Thompson believes it is only equitable and fair that the Government assume the obligation and be allocated these risks because it ordered the production of Agent Orange to its own specifications, completely controlled the use (or misuse) of the

product, and never shared any information about potential hazards in the product with the manufacturer. In short, if anyone was negligent here, it was the Government and the financial liability should, therefore, be borne by it and not by the innocent manufacturers of Agent Orange. The plaintiff, therefore, contends that it is entitled to be indemnified by the Government for the costs it incurred under any one of three contractual theories.

The plaintiff's first theory involves the matter of the Government's alleged superior knowledge. Here, the plaintiff asserts that there was an implied-in-fact obligation on the part of the Government to reveal its *superior knowledge* concerning the nature and possible health risks of Agent Orange so as to not increase the plaintiff's cost of performance under the contract.

Second, the plaintiff alleges a warranty of specification theory. This theory is based upon an alleged Governmental breach of its implied-in-fact contractual obligation that the Agent Orange it required Thompson to manufacture would be safe and free from defects.

Third and finally, the plaintiff alleges that the Government was bound by an implied-in-fact contractual duty to indemnify Thompson for losses due to the Government's requirement that Thomspon produce Agent Orange.

The defendant, for its part, opposes each one of the plaintiff's three breach of implied-in-fact contract arguments on factual as well as legal grounds. In addition, the defendant asserts that the rationale surrounding the Government contractor defense supplies an independent legal basis for finding in its favor.

After full consideration of the parties' briefs and oral arguments, it is evident to the Court that only the plaintiff's second claim regarding the warranty of specification has any potential vitality. The other two claims bear superficial resemblance to viable implied-in-fact contract

theories, but, upon closer inspection, they do not meet the requirements established in the appropriate precedential case law. However, in the interest of completeness, this Court will discuss each of the plaintiff's three contractual claims and defendant's responses to them.

A. *Plaintiff's Implied-In-Fact Contract Claims.*

1. Doctrine of Superior Knowledge

There is a line of cases which allows Government contractors to recover from the Government the unexpected increased costs of performance of a contract if the Government, at the time the contract was formed, had superior knowledge regarding difficulties in production which were not apparent and were not otherwise known by the contractor. *American Ship Bldg. Co. v. United States,* 228 Ct. Cl. 220, 654 F.2d 75 (1981); *Hardeman-Monier-Hutcherson v. United States,* 198 Ct. Cl. 472, 458 F.2d 1364 (1972); *J.A. Jones Constr. Co. v. United States,* 182 Ct. Cl. 615, 390 F.2d 886 (1968); *Helene Curtis Indus., Inc. v. United States,* 160 Ct. Cl. 437, 312 F.2d 774 (1963); *J.F. Shea Co. v. United States,* 4 Cl. Ct. 46 (1983).

From this precedent, the plaintiff argues that the Government is liable to the manufacturers of Agent Orange for their costs in defending and settling the suits brought against them by Vietnam veterans. This is because the Government allegedly knew more about the hazards of dioxin contained in the Agent Orange than did the herbicide manufacturers, and the Government breached its duty (contractual obligation) to reveal this superior knowledge to the plaintiff.

The defendant counters that the plaintiff was an experienced manufacturer of 2,4,5-T through its commercial products. Also, it complied with the general reporting and registration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 135 *et seq.*

(1964) (FIFRA).[7] In view of this, the Government could reasonably assume that the plaintiff had tested its products as required by FIFRA and would be aware of potential hazards associated with 2,4,5-T.

While the determination of how much knowledge both the plaintiff and the Government had about the hazards of dioxin and Agent Orange is fact-intensive and not suitable for summary judgment, this Court believes it is not necessary to reach a decision on this factual issue. In analyzing these cases, it is clear to this Court that the doctrine of superior knowledge covers *only* unexpected costs in the *performance* of the contract. None of the cases cited by the plaintiff involving the doctrine of superior knowledge extend the doctrine beyond the production of the item contracted for, be it disinfectant powder (*Helene Curtis*) or the construction of a dock in Australia (*Hardeman-Monier-Hutcherson*). In all of the cases cited above, the Government knew about some nonobvious obstacles that anyone would encounter in trying to produce the contracted-for item. For example, in *Helene Curtis,* it was a new substance that needed grinding in order to mix properly into the disinfectant powder, and, in *Hardeman-Monier-Hutcherson,* it was severe weather conditions and water currents that made the dock much more difficult to construct.

The common thread is that, in all of these cases, the contractor had to spend more time or money on production than it anticipated when entering into the contract with the Government because of latent difficulties in the manufacturing or construction process. Also, the Gov-

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[7] In addition to the general reporting and registration requirements imposed by FIFRA, 7 U.S.C. § 135a, the act also requires manufacturers to test products prior to marketing them. Specifically, 7 C.F.R. § 162.106 (1949) requires that the manufacturer have the product thoroughly tested by experimenters, and if it is "likely to cause injury to human beings, or desirable plants or animals, its limitations from these standpoints should be determined and adequate cautions placed on the label."

ernment, at the time of contract formation, had knowledge of the latent problems that would raise performance costs and did not divulge this knowledge to the contractors. Thus, citing to *Helene Curtis,* the United States Court of Claims in *American Ship Bldg. Co.,* 228 Ct. Cl. at 225, 654 F.2d at 79, stated that the four factors of the superior knowledge doctrine were:

> [W]here (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

To satisfy the requirements of the doctrine, the vital knowledge, which the Government possesses and the contractor does not, must be a fact that affects *performance costs* or *duration of performance.* In the case at hand, plaintiff does not claim that it had any unforseen problems in the manufacture of the Agent Orange which increased the costs of production or caused a delay in performance. Thus, the superior knowledge doctrine does not apply to plaintiff's claim and does not entitle it to recover costs that were not connected to actual *performance* under the contract, which was for the manufacture of the Agent Orange to the detailed Government specification. *See generally, Lopez v. A.C. & S., Inc.,* 858 F.2d 712, 717-18 (Fed. Cir. 1988), *cert. denied,* 491 U.S. 904 (1989). Prior case precedent simply does not allow the expansion of the doctrine of superior knowledge to be extended as far as the plaintiff apparently wants it to stretch. The time frame that the courts have found appropriate to review has always been the period of performance only—not some indefinite time stretching well into the future.

2. Warranty of Specification.

In *United States v. Spearin,* 248 U.S. 132, 136-37 (1918), the Supreme Court held that the inclusion of detailed specifications in a contract prepared by the Government imported a warranty that, if the specifications were followed, the resulting product would be adequate, and the contractor would not be responsible for the consequences of defects in the specifications. This implied warranty of specification has been recognized in many cases since *Spearin. See e.g., Ordnance Research, Inc. v. United States,* 221 Ct. Cl. 641, 609 F.2d 462 (1979); *Hol-Gar Mfg. Corp. v. United States,* 175 Ct. Cl. 518, 360 F.2d 634 (1966); *Blount Bros. Corp. v. United States,* 872 F.2d 1003 (Fed. Cir. 1989).

In *Spearin,* the defect became apparent due to damage that occurred during the performance of the contract. *Spearin,* 248 U.S. at 134-35. However, the warranty of specification is not limited to the time of performance, according to the holding in *Poorvu v. United States,* 190 Ct. Cl. 640, 420 F.2d 993 (1970). In that case, the defect in the specified construction method did not begin to manifest itself until some four years after the completion of the building, and the United States Court of Claims determined that the *Spearin* warranty of specification still operated to place the liability for the damage on the Government, which had dictated the construction specifications. *Poorvu,* 190 Ct. Cl. at 651, 420 F.2d at 1000.

Plaintiff argues that an implied-in-fact warranty of specification arose in this case because the Government supplied detailed specifications for Agent Orange to Thompson, and the plaintiff manufactured the defoliant in accordance with these detailed specifications. The warranty of specification means that the Government impliedly warranted that the item made to the precise specification would be safe and free from defects. Plaintiff claims that the Government breached this warranty because the plaintiff was subjected to tort suits by third

parties who claimed they were injured by the Agent Orange the plaintiff manufactured.

The Government contends that plaintiff's claim is nearly identical to claims made by the asbestos manufacturers that, based on contract theories, attempted to recover from the United States costs they incurred as a result of suits brought by shipyard workers who were exposed to asbestos dust from using insulating products. The asbestos manufacturers made these products in accordance with military specifications and sold them to the United States during the World War II era and thereafter. Accordingly, the defendant relies on two asbestos-related cases, *Lopez* and *GAF Corp.*, for its defensive position. The Government contends that these cases bar the plaintiff's warranty of specification claim on the grounds that the factual circumstances of this case do not support finding an implied-in-fact agreement, a meeting of the minds, and this Court lacks jurisdiction over contracts that are implied at law. *Lopez,* 858 F.2d at 714-15; *GAF Corp.*, 932 F.2d at 950.

For a warranty to be implied in fact, the plaintiff must demonstrate that "the circumstances strongly supported a factual inference that a warranty was implied." *Lopez,* 858 F.2d at 715. Such an inference arises only when the Government specifications told the contractor "just how to do the job," *Id.* at 716, and not when they merely specified some certain characteristic in the contracted-for product. *GAF Corp.*, 932 F.2d at 950. With respect to the claims of breach of warranty of specification, the Court agrees with the plaintiff that the underlying bases of the decisions in *Lopez* and *GAF Corp.* were that the asbestos companies knew about the dangers of their products before entering into the contracts with the Government and that the products manufactured under the Government contracts did not differ materially from those already sold commercially. Thus, there was no basis for finding a factual inference that the specifications constituted an "extensive Government intrusion into the asbestos pro-

duction process which might suggest that the Government intended to warrant the product's safety." *GAF Corp.*, 932 F.2d at 950.

Plaintiff argues that, in this case, there exists the extensive Government intrusion into the Agent Orange production process that suggests that the Government intended to warrant the product's safety. Also, the plaintiff alleges that it is unlike the asbestos manufacturers because it knew less than the Government did about the defoliant, and Agent Orange differed materially from the products plaintiff sold commercially.

However, even assuming that a warranty of specification arose from the Government's detailed specifications for Agent Orange, there must be more than the mere existence of a warranty to entitle the plaintiff to recover against the Government. Plaintiff must also show that this warranty was *breached* by the Government and that this breach caused plaintiff to suffer the type of damages recoverable in contract. It is on these requirements, breach and contract damages, that the plaintiff has failed to state a case that can withstand the Government's summary judgment motion.

Turning again to *Spearin* and its progeny, the implied warranty of specification was breached when the product, made in accordance with the detailed specification created by the Government, was inadequate, and the inadequacy clearly caused some damage. In *Spearin*, the sewer was inadequate due to a problem with a blocked sewer pipe in the existing system; the new pipe broke, and the sewer overflowed and damaged the dry dock that the contractor was building for the Government. *Id.*, 248 U.S. at 134. In *Poorvu*, the parking area for a building was constructed with inadequate support below it, in accordance with the Government's specifications. This caused the parking area to settle and put pressure on water pipes that were located beneath it. These pipes broke, and the water spilling from them saturated the ground under the building, which then weakened the support under the

building, causing it to settle severely into the ground. *Id.*, 190 Ct. Cl. at 646-47, 420 F.2d at 997.

In these cases, it is clear that the specification was inadequate, and the resulting defect in the finished product caused obvious and direct damage. The courts in these cases appeared to analyze these situations by determining first, whether or not some damage had occurred, and second, whether or not the specification written by the Government was defective. If these two circumstances were present, the courts then determined which party should bear the risk of the faulty specification causing the damage. The implied warranty of specification is the method by which the court can allocate the risk of the faulty specification to the Government, which created the specification, rather than to the contractor, who actually built the defective item that caused the damage. *See* JOHN C. CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 199-202 (2d ed. 1985). As stated in *Spearin*, 248 U.S. at 136, "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." Also, the court held in *Poorvu* that "the government must answer for damage incurred because of inadequate plans it has furnished." *Id.*, 190 Ct. Cl. at 651, 420 F.2d at 1000.

In this case, plaintiff asserts that the Government designed faulty specifications for Agent Orange because dioxin contaminated the specified defoliant product. The damage plaintiff claims as a result of the faulty specification is, however, the settlement costs it incurred when veterans claimed they were injured by the dioxin in the Agent Orange used for military purposes in Vietnam. Thus, the plaintiff claims that the Government breached the warranty by subjecting the chemical manufacturer to tort liability running to third parties who were injured by the Government's use of the Agent Orange manufactured

by the plaintiff. However, for several reasons, the plaintiff cannot prove that it was actually subjected to tort liability by third parties because of its manufacture of Agent Orange for the Government's military use. First, dioxin has never been scientifically proven to cause the injuries that the veterans alleged, and second, the plaintiff was protected from liability to the veterans in any event under the Government contractor defense, which is discussed later in this opinion. Thus, to the extent that the warranty of specification does exist in this case, there has been no breach of the implied warranty of specification because the alleged defect in the herbicide has never been proven, and the plaintiff would not have been liable to third parties even if the specifications had been defective due to the Government contractor defense.

It is clear to this Court, after reviewing the many and varied decisions regarding the veterans' suits against the herbicide manufacturers, that Agent Orange and dioxin have never been proven to cause the injuries claimed by the veterans. As stated in the *Settlement Opinion,* "the result of an enormous scientific effort to be helpful on causation has, from the plaintiffs' point of view, left the case at best open. This is not sufficient to support a recovery in tort law * * *." *Id.,* 597 F. Supp. at 795. Likewise, when the claims of the veterans who opted out of the class went forward after the settlement of the class action, the United States District Court for the Eastern District of New York granted summary judgment to the chemical manufacturers (including Thompson) and noted that "years of discovery and tens of millions of dollars spent by the government and others on research has not yielded any competent evidence indicating a genuine issue of fact about causation." *Opt-out Opinion,* 611 F. Supp. at 1260. Thus, plaintiff cannot show that it has been held liable to a third party for damages caused by a defect in the herbicide it produced for the Government under detailed specifications.

As for damages arising from contract breaches, it is axiomatic that such damages are limited to those that were reasonably foreseeable at the time the parties formed the contract. *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854). In *Northern Helex Co. v. United States,* 207 Ct. Cl. 862, 888, 524 F.2d 707, 721 (1975), *cert. denied,* 429 U.S. 866 (1976), the court reviewed the rules governing damages for breach of contract and concluded that the authorities support denial of claims where "costs are too remote, speculative, and consequential to be compensable as damages." In this case, it is apparent that the costs (damages) plaintiff incurred by defending and settling a lawsuit brought by veterans, who were never able to prove that the plaintiff's product injured them, were not reasonably foreseeable at the time the contract was formed between the Government and the plaintiff.

Plaintiff urges that there is a strong judicial policy favoring settlements and the fact that it settled the underlying case, rather than litigating the issue of its liability to the veterans, should not count against plaintiff in its attempt to recover from the Government for breach of warranty. It is true that settlements are encouraged. *See e.g., Ahern v. Central Pac. Freight Lines,* 846 F.2d 47, 48 (9th Cir. 1988); *Janneh v. GAF Corp.,* 887 F.2d 432, 435 (2d Cir. 1989). However, the cases plaintiff cites regarding the recovery of settlements paid to third parties involve indemnification agreements, either implied-in-fact or implied-at-law. *Travelers Ins. Co. v. United States,* 493 F.2d 881 (3d Cir. 1974); *Parfait v. Jahncke Serv., Inc.,* 484 F.2d 296 (5th Cir. 1973), *cert. denied,* 415 U.S. 957 (1974). This Court does not have jurisdiction over contracts implied at law. *United States v. Mitchell,* 463 U.S. 206, 218 (1983). As for an implied-in-fact contract, the factual circumstances do not support one because it simply was not foreseeable to the parties that the Agent Orange class action settlement would come to pass more than a decade after the contracts to supply the defoliant were formed. The facts may support an implied

warranty of specification, but they cannot be stretched so far as to support the theory that the parties came to a meeting of the minds that there would be an indemnification agreement between them if the implied warranty of specification was alleged, but never proven, to be violated.

As for plaintiff's claim of attorney fees, the court in *Kania v. United States*, 227 Ct. Cl. 458, 467, 650 F.2d 264, 269, *cert. denied*, 454 U.S. 895 (1981), noted that "jurisdiction to award counsel fees and other litigation expenses as an element of breach damages would be extremely dubious. It is the kind of consequential damages not normally awarded in contract breach cases." *Also see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Overall, "[c]ourts do not, in awarding breach damages, follow through the remote indirect consequences of the breach as distinguished from those directly in contemplation when the contract was made." *Kania*, 227 Ct. Cl. at 467, 650 F.2d at 269. Thus, plaintiff cannot support a contention that it suffered compensable damages to the amount of its legal fees and costs as a result of the Government's alleged breach of the implied warranty of specification.

Finally, the question remains as to whether plaintiff could ever have been found liable to third parties, even if causation between Agent Orange and veterans' injuries had been proven. The Government contractor defense would certainly present a serious obstacle to a manufacturer's liability to military service personnel for defects in products made to Government specifications for military applications. *See Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977); and *Feres v. United States*, 340 U.S. 135 (1950). The Government contractor defense will be discussed more fully in a later section of this opinion, but its impact on any liability the plaintiff would have to third parties must be noted at this juncture. The plaintiff asserts, in its arguments involving

superior knowledge, that it manufactured the product to detailed specifications and lacked the knowledge it alleges the Government had regarding the hazards of Agent Orange. If this is true, then the plaintiff would avoid liability to third parties based on the Government contractor defense. *Boyle*, 487 U.S. at 512. The plaintiff had an absolute defense. Plaintiff was well aware of this strong defense before it agreed to settle the claims of the veterans because, in 1983, it was granted summary judgment in its favor on the basis of the Government contractor defense, *Agent Orange*, 565 F. Supp. at 1275, even though plaintiff was later brought back into the case. Thus, in addition to the reasons already discussed above, there was no breach of the warranty of specification based on the manufacturer's tort liability to third parties supposedly injured by the product because the manufacturer, under the circumstances alleged, was protected from liability by the Government contractor defense.

3. Contract Indemnification.

For contractual indemnification to exist and to be actionable in this Court, it must arise from an express or implied-in-fact contract term. As noted earlier, this Court has no jurisdiction over contracts or contract terms which are implied at law. *United States v. Mitchell*, 463 U.S. at 218. While there was no express indemnification term in the procurement contract, plaintiff claims there is an implied-in-fact contract indemnification term springing from section 2157 of the Defense Production Act of 1950, 50 U.S.C. app. §§ 2061 *et seq.* (1964) (DPA), and the fact that the Government compelled plaintiff to manufacture Agent Orange. Section 2157 of the DPA provided that:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act * * *.

Based on this section, plaintiff argues that an implied-in-fact indemnification term arose in the procurement contract between the plaintiff and the Government in regard to its Agent Orange contracts.

Plaintiff and the other chemical manufacturers also raised section 2157 as a defense in the district court suit brought by the veterans. However, Chief Judge Weinstein explained that section 2157 of the DPA was enacted as a *quid pro quo* to 50 U.S.C. app. § 2071, which authorizes the President to require that performance of contracts under the DPA take priority over other contracts currently binding the manufacturer. *Settlement Opinion*, 597 F. Supp. at 844. Thus, the court concluded that,

> Logically, then, the protection afforded by section [2157] should correspond to the risk imposed, viz., the possible need for the contractor to break its contracts with third parties or the increased risk to employees or users posed by speeded-up production. Except in rare instances there is no logical connection between the compulsion of section [2071] and the risk of injuries to those using or exposed to the contractor's product; the risk is something that all government contractors have in common and is already taken into account in the government contract defense.

Id. at 845.

This Court agrees with the district court and finds that the DPA does not create an implied-in-fact contract term which would indemnify the plaintiff for any tort suits brought by users of the product the plaintiff made for the Government under the DPA. Instead, section 2157 provides the Government contractor with a defense. This defense excuses the Government contractor's breach of its other, non-Government contracts which were adversely affected by the priority given to the Government's procurement demands under the DPA. *See e.g., Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957,

997 (5th Cir. 1976). It does not create an indemnification agreement between the Government contractor and the Government to cover tort damages suffered by users of the product procured under the DPA. *Settlement Opinion*, 597 F. Supp. at 845.

However, even if this Court were to assume, which it does not, that such an implied-in-fact contract term arose from the dealings between the parties alone, the term itself could not operate to bind the Government. It is clear that the United States cannot be bound by a contract, or a term within a contract, into which its agents were without the legal authority to enter. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). This principal applies regardless of whether or not the contract is express or implied. *Sutton v. United States*, 256 U.S. 575, 580 (1921). However, the plaintiff cannot show that the agent of the Government had the authority to enter a binding indemnification agreement because, for indemnity to exist, there must be either a prior appropriation to cover the possible costs of indemnity and/or a statutory exception to this rule permitting such payments. *See Matter of: Assumption by Government of Contractor Liability to Third Persons—Reconsideration*, 62 Comp. Gen. 361 (1983). This is because an unfunded or unexcepted indemnification term would violate the Anti-Deficiency Act, 31 U.S.C. § 1341 (1988), which bars a federal agency from entering into a contract for future payments in excess of an existing appropriation. The Anti-Deficiency Act states, in pertinent part, that officers or employees of the United States may not:

> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
>
> (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341 (1988).

Thus, in *California-Pacific Util. Co. v. United States*, 194 Ct. Cl. 703 (1971), the United States Court of Claims dismissed an indemnification claim brought by a utility company seeking to recover amounts paid in settlement to a federal employee injured by one of its electric poles. The Court stated that:

> The United States Supreme Court, the Court of Claims, and the Comptroller General have consistently held that absent an express provision in an appropriation for reimbursement adequate to make such payment, [the Anti-Deficiency Act] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated.

Id., 194 Ct. Cl. at 715.

In the present case, plaintiff presents no appropriation or statutory exemption [8] which would authorize indemnification in this case. Thus, even if an implied indemnification agreement existed, it would be unenforceable under the Anti-Deficiency Act. Therefore, the plaintiff has no grounds for recovery on any contractual indemnification theory.

After consideration of all of the plaintiff's contractual arguments, it is apparent that most of the theories plaintiff advanced do not apply to hold the Government liable for the amount paid in connection with the settlement of the class action suit. The warranty of specification might apply to the Government based on the detailed specification for the production of Agent Orange. However, plaintiff has failed to come forth with the required quantum of proof regarding the breach of this warranty and the contract damages flowing therefrom. Thus, the moving

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[8] As earlier stated, section 2157 of the DPA does not create a contractual indemnification agreement between Thompson and the Government, but only a defense. Such a defense is to be utilized by the Government contractor in the event the DPA contracts have placed the contractor in breach of its other non-Government contractual commitments.

party is entitled to summary judgment because the non-moving party, the plaintiff, has "failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex v. Catrett*, 477 U.S. at 323.

B. *The Government Contractor Defense*

Even if this Court is in error when it finds no breach and no damages as a matter of law in this case, the plaintiff would still not be able to recover in this action because of the Government contractor defense. The defendant alleges that, regardless of the resolution of the contractual issues in this matter, the Government contractor defense provides a *separate* and *independent* basis for a denial of the plaintiff's claims. Based on the policies underlying the Government contractor defense, the defendant states that the plaintiff cannot be allowed to recover indirectly through this contract suit for reimbursement what the veterans could not recover directly against the Government under the Federal Tort Claims Act, 28 U.S.C. § 2671-80 (1988) (FTCA), i.e., tort damages from the Government payable to military personnel for injuries allegedly sustained while serving on active duty.

Plaintiff counters that the Government contractor defense was not settled law at the time of the settlement with the veterans in the class action suit, so there was the possibility that it might have been held liable to the veterans for billions of dollars. Thus, their decision to settle was very reasonable in the face of the possibility of massive liability. Also, the plaintiff asserts that the Government, in a brief it filed in the *Opt-out Opinion* in the district court action, argued against the application of the Government contractor defense to shield the herbicide manufacturers from liability, and thus the Government should be estopped from urging its application here.

While the Government contractor defense is certainly important to the resolution of the issues in this case, both

parties have neglected to consider crucial matters in support of their respective arguments. What is primarily at issue in this case is the *Government's liability* to the plaintiff under these circumstances, not just the plaintiff's liability to the veterans. Fortunately, this issue has already been considered by the Supreme Court in *Stencel*, and this Court will follow its clear guidance in the instant case.

In *Stencel*, a serviceman, who was injured when the ejection system of his fighter aircraft malfunctioned, brought a product liability damage action against the manufacturer, Stencel, and the United States. Stencel cross-claimed against the Government for indemnity claiming that any malfunction in the system was due to faulty Government specifications and components. Based on the earlier *Feres* case, the Supreme Court upheld the district court's grant of summary judgment for both the Government and Stencel against the serviceman and also upheld the dismissal of Stencel's cross-claim against the Government.

In the *Feres* case, the Supreme Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the FTCA. *Id.*, 340 U.S. at 146. The Supreme Court in *Stencel* reviewed the *Feres* decision and concluded that it rested on three factors. First, the Supreme Court found that the relationship between the Government and its military personnel is distinctively federal in character, and, thus, it would not make sense to have the liability of the Government to an injured serviceman depend on the law of the place where the injury occurred. Second, the Supreme Court determined that the statutory compensation scheme, which provides pensions and medical services to injured servicemen without regard to any negligence by the Government, stands as a legal substitute for allowing the Government to be sued in tort for negligence. Third and finally, the Supreme Court concluded that military discipline and the relationship between a

soldier and his superiors, which has no counterpart in civilian affairs, might be distorted by the imposition of tort liability. *Stencel*, 431 U.S. at 671-72.

In the case of the contractor suing the Government, the Supreme Court determined that the same factors were relevant and that it must "consider the impact of these factors where, as here, the suit against the Government is not brought by the serviceman himself, but by a third party seeking indemnity for any damages it may be required to pay the serviceman." *Id.*, 431 U.S. at 672. The first factor, the application of federal rather than state law, and the third factor, the effect of tort liability on military discipline, operated with equal force in suits by the serviceman and suits by the contractor. *Id.*, 431 U.S. at 672-73. The second factor, the existence of the military compensation scheme, the Supreme Court found more difficult to apply in the case of the contractor suing to recover funds it had paid to the serviceman. However, it concluded that the compensation scheme served the dual purpose of providing an efficient remedy for the injured serviceman and also protected the Government through its limitation of liability provisions which provide an upper limit on the Government's liability for service-connected injuries. *Id.*, 431 U.S. at 673. Thus, in *Stencel*, 431 U.S. at 673, the Supreme Court determined that:

> To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential features of the Veterans' Benefits Act. As we stated in a somewhat different context concerning the Tort Claims Act: "To permit [petitioner] to proceed . . . here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claims] Act permits such a result." [Citations omitted, alterations and omissions in original.]

Therefore, the contractor was not allowed to recover from the Government where the underlying claim for which the

contractor was seeking indemnity was made by an injured serviceman. In conclusion, the Court observed that "[s]ince the relationship between the United States and [the contractor] is based on a commercial contract, there is no basis for a claim of unfairness in this result." *Id.*, 431 U.S. at 674.

The situation analyzed in *Stencel*, a contractor seeking indemnity from the United States for claims made by an injured serviceman, is analogous to plaintiff's claim in this case. Plaintiff in this action is seeking repayment from the Government of amounts it paid to injured military service personnel based on the Government's provision of specifications for the product which allegedly harmed the military service personnel. BLACK'S LAW DICTIONARY 769 (6th ed. 1990) defines indemnity as "reimbursement." Reimbursement of the amounts it paid in settlement and legal fees is what plaintiff requests here, and, thus, the strictures of the *Stencel* case apply and foreclose plaintiff's claim that the Government must reimburse it for its costs and fees in connection with the Agent Orange litigation. This suit by the plaintiff is a "back door" attempt to recover from the Government what the *Feres* doctrine blocked at the front door; that is, damages for injuries suffered by servicepersons in the line of duty. Accordingly, the rationale of *Stencel* requires this Court to deny the plaintiff's claim.

The reasoning of *Feres* and *Stencel* was later amplified and extended by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which involved an action between private parties but implicated the Federal Government's interests. In *Boyle*, a United States Marine co-pilot was killed when his helicopter crashed into the water during a training exercise. Although the Marine survived the impact, he was unable to escape from the submerged helicopter and drowned. Based on state tort law, the Mairne co-pilot's estate sued the Government contractor that built the helicopter, claiming that the escape hatch was designed negligently because it opened

outwards and was unusable when the helicopter was under water, due to the pressure of the water outside the submerged craft. The Government contractor (United Technologies) contended that it made the escape hatch to the precise specifications required by its contract with the Government and therefore was not liable under state tort law.

Even though it was a state law tort suit between private parties, the Supreme Court found that "the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one—even though the dispute is one between private parties." *Id.*, 487 U.S. at 506. Thus, federal law could possibly apply. However, for federal law to displace state tort law, there must be a significant conflict between a federal policy and the operation of the state tort law. *Id.*, 487 U.S. at 507. Looking at the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1988) (FTCA), the Supreme Court indentified a provision that suggested the outlines of a significant conflict between federal interests and state tort law in the area of Government procurement. While the FTCA authorized suits against the Government for harm caused by the negligent or wrongful conduct of Government employees in certain circumstances, it specifically excepted from consent to suit any claims based on the exercise of a discretionary function by a federal agency or employee, 28 U.S.C. § 2680(a) (1988). *Boyle*, 487 U.S. at 511. The Court determined that:

> [T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments * * * through state

> tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. [Citations omitted.]

Id. Thus, the state law, which would hold the Government contractor liable for design defects in military equipment, is displaced by the federal policy and law of deferring to military discretion in the procurement of military equipment embodied in the FTCA.

The Supreme Court in *Boyle* adopted a three-part test to determine when, to avoid conflict with the discretionary function exception, displacement of state law is appropriate. It stated:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id., 487 U.S. at 512. If the contractor satisfies this test, then it is not subject to tort liability under state law for defects in equipment it manufactured for the military in conformance with precise specifications provided by the Government. This is because such liability would infringe on the discretionary function exception to the FTCA by allowing a state court to second-guess indirectly the Government's judgment in the selection of the appropriate design for military equipment.

Relying on the Government contractor defense, the defendant argues here that the plaintiff's Tucker Act claim for contractual damages, just like a state court tort suit, is an attempt to have the judiciary second-guess the Government's decision to procure and employ Agent Orange. The defendant claims that this flies in the face of the Government contractor defense and the discretionary function exception and that it does violence to the policy

of Government discretion in military procurement which these doctrines protect. Thus, based on the policies underlying the Government contractor defense, the defendant contends that the plaintiff is barred from recovery on its Tucker Act claim.

The Government contractor defense is important to the instant case for two reasons. First, its underlying policies, as expressed in *Boyle*, are to protect the discretion of the Government in procuring military equipment, as mandated by the discretionary function exception to the FTCA. Therefore, this Court must determine whether these policies apply equally to suits by contractors against the Government as they do to suits by injured military personnel against the contractor, which *Boyle* addressed specifically. Second, this Court must consider whether the Government contractor defense operated in the suits plaintiff faced and provided plaintiff with such a strong defense that it is without grounds to claim that it was actually in grave danger of being held liable to third parties in tort for injuries stemming from the product it produced for the Government.

This Court agrees with the defendant's argument that the policies supporting the *Boyle* decision apply with equal force to an attempt by a Government contractor to sue the Government directly. The Supreme Court in *Boyle* was concerned with preserving the discretion of the military in choosing the appropriate design for military equipment because this choice involves balancing many conflicting considerations, including the trade-off between safety and combat effectiveness. *Id.*, 487 U.S. at 511. This exact same discretion and balancing by the Government is implicated in the case at issue.

The Government procured Agent Orange to serve military needs in Vietnam. The product was designed and used to save American soldiers' lives by eliminating possible hiding places for the Viet Cong and North Vietnamese troops. Trade-offs between the effectiveness of

Agent Orange and its safety were a necessary part of the Government's procurement and design activities. This Court agrees with Chief Judge Weinstein, who found that "[t]he information available makes it clear that the government would have concluded that the beneficial saving of American soldiers' lives by defoliating the Vietnamese jungles far outweighed any minimal risks to our own or allied troops posed by exposure to Agent Orange." *Opt-Out Opinion*, 611 F. Supp. at 1263-64. As another court has noted, "[i]t is this sort of balancing which the *Boyle* defense protects, by providing for contractor immunity where state tort law would hold the contractors liable for injuries resulting from the government's design deficiencies." *In re Aircraft Crash Litig.*, 752 F. Supp. 1326 1370 (S.D. Ohio 1990), *aff'd without op.*, 935 F.2d 269 (6th Cir. 1991). Thus, this Court will heed the warning in *Boyle*, 487 U.S. at 511, and not second-guess military procurement decisions made by the Government in the guise of allowing the plaintiff contractor to recover from the Government payments made to injured service persons. Also, this Court will not restructure the United States' immunity and consent to tort suits, which are specified by the FTCA and its exception for discretionary functions, through the vehicle of a contract claim based on tort damages, especially in light of the expansion of immunity clearly manifested in *Boyle*. *Lopez*, 858 F.2d at 718.

Plaintiff argues that the Government contractor defense would not have applied to shield it from liability if the veterans' suit had not been settled because the unwanted dioxin which contaminated the Agent Orange was not a part of the Agent Orange policy considerations which are protected by the discretionary function exception. Plaintiff admits that the decision to use Agent Orange was a discretionary governmental decision but alleges that the use of design specifications which resulted in contamination was not a policy level determination protected by the discretionary function exception. Plaintiff claims this type

of parsing a decision into bits that are either discretionary or nondiscretionary is supported by the holding in *United States v. Gaubert*, —— U.S. ——, 111 S. Ct. 1267 (1991). However, it is clear that *Boyle* has already decided that the procurement of military equipment, when the United States Government approved reasonably precise specifications, is subject to the discretionary function exception. *Id.*, 487 U.S. at 512. This is the first prong of the *Boyle* test, and, along with the second prong, it assures that "the suit is within the area where the policy of the 'discretionary function' would be frustrated—*i.e.*, they assure that the design feature in question was considered by the Government officer, and not merely by the contractor itself." *Id.* Therefore, since *Boyle* clearly holds that the procurement of military equipment by the Government under reasonably precise specifications is a discretionary function, there is no need to apply the more general analysis of a discretionary function in *Gaubert*. Plaintiff has repeatedly urged that the Government created the precise specifications, that it followed these specifications exactly, and that it was unaware of any hazards which the Government may have known about. Thus, by plaintiff's own factual assertions, it is evident that the procurement of Agent Orange, even though contaminated by dioxin, was a discretionary function of the Government.

Plaintiff submits that *Boyle* was several years subsequent to the settlement in this case in 1984, and that, in 1984, the application of the Government contractor defense was, at best, uncertain. In effect, plaintiff argues that *Boyle* created a new doctrine and that it should not be applied retroactively. This raises the second reason for consideration of the Government contractor defense; namely, its availability to the plaintiff as a defense in the state tort suits it faced. The defendant contends that the plaintiff would never have been required to pay the veterans for their alleged injuries because, as a Government contractor, the plaintiff was completely protected by the

Government contractor defense. The Government notes that plaintiff was, in fact, granted summary judgment earlier against the opt-out claimants in view of the Government contractor defense in the district court. *Opt-out Opinion*, 611 F. Supp. at 1263-64. Also, the United States Court of Appeals for the Second Circuit affirmed on this basis, because "[s]ubjecting military contractors to full tort liability would inject the judicial branch into political and military decisions that are beyond its constitutional authority and constitutional competence." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 191.

Plaintiff argues that it is unfair to retroactively apply *Boyle*, which was decided in 1988, to the issues plaintiff faced at the time of the settlement in 1984. However, this Court is not applying *Boyle* retroactively. The Government contractor defense existed long before *Boyle*. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). Instead, using *Boyle* as a guide, this Court is applying the holdings of *Feres* (1950) and *Stencel* (1977), as discussed earlier, and the discretionary function exception to the FTCA, to the issues presented in this case. *Feres*, *Stencel*, and the FTCA were all operative at the time of the settlement in 1984 and would have barred a military contractor's tort liability to injured military service personnel. In fact, the defense was fully discussed by Judge Pratt in his 1983 decision, which granted the plaintiff's motion for summary judgment and allowed the plaintiff to be removed from the class action suit based on the operation of the Government contractor defense. *Agent Orange*, 565 F. Supp. at 1265. Thus, the later decision in *Boyle* did not chart a new course for Government contractors. It merely enunciated and clarified the Government contractor defense which already existed.

As a final note, plaintiff also argues that the Government has taken inconsistent positions, by opposing the Government contractor defense in the district court and supporting it in this case. Plaintiff claims that the Government should be estopped from asserting a different

position in this case than it took in the earlier case in which it filed the brief. Under *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), it is unlikely that estoppel will be found against the Government without a showing of fraud or affirmative misconduct by the Government. *Heckler v. Community Health Serv., Inc.*, 467 U.S. 51, 67 (1984); *Schweiker v. Hansen*, 450 U.S. 785, 788-89 (1981); *Jana, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991), *cert. denied*, 116 L. Ed. 2d 775 (1992); *Bolt v. United States*, 944 F.2d 603, 609 (9th Cir. 1991); *Portmann v. United States*, 674 F.2d 1155, 1164 (7th Cir. 1982); *People's Bank & Trust Co. v. United States*, 7 Cl. Ct. 665, 668-69 (1985). No fraud has been shown or even alleged here, but plaintiff does claim affirmative misconduct on the part of the Government. However, even if plaintiff were able to meet the extremely stringent standard necessary to prove affirmative misconduct, *see e.g., Immigration & Naturalization Serv. v. Miranda*, 459 U.S. 14, 17-18 (1982), plaintiff's estoppel argument still fails on more basic grounds. Even assuming that the Government is ever subject to estoppel, a party cannot prevail without at least showing that the traditional elements of estoppel are present. *Lyng v. Payne*, 476 U.S. 926, 935 (1986). Plaintiff's claim does not meet the basic elements of traditional estoppel, which arises when "one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act" which changes his position for the worse. *Heckler v. Community Health Serv., Inc.*, 467 U.S. at 59 (quoting RESTATEMENT (SECOND) OF TORTS § 894(1) (1979)). In this case, the plaintiff did not *rely* on the assertions in the Government's brief either in its decision to settle or in its defense in the opt-out cases for which the brief was filed. The assertions in the Government's brief did not affect the plaintiff's settlement decision because the brief in question was filed in another case on August 31, 1984, several months *after* the decision to settle was announced in

the class action suit, which occurred on May 7, 1984. *Settlement Opinion*, 597 F. Supp. at 748. Also, in the opt-out cases, the plaintiff must have pressed the Government contractor defense regardless of the Government's brief because the plaintiff received summary judgment against the opt-out claimants based in part on the operation of the Government contractor defense. *Opt-out Opinion*, 611 F. Supp. at 1263. Thus, plaintiff cannot establish its reliance on the assertions of the Government, and so it fails to meet the traditional and basic requirements of estoppel.

In final summary, the plaintiff has failed to convince this Court that it can recover on any one of its implied-in-fact contract theories. Further, even if any one of its three contract theories could be found to be factually supportable, the plaintiff would still lose this lawsuit because of the application of the Government contractor defense to the undisputed facts.

CONCLUSION

For the reasons stated above, the defendant's motion for summary judgment is granted, and the complaint is to be dismissed.

No costs.

[Filed Apr. 22, 1992]

IN THE UNITED STATES CLAIMS COURT

No. 90-391 C

WM. T. THOMPSON COMPANY,
A MISSOURI CORPORATION

v.

THE UNITED STATES

JUDGMENT

Pursuant to the opinion of April 22, 1992, granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

DAVID A. LAMPEN
Clerk of Court

April 22, 1992 By: /s/ Linda A. Elkins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5124

HERCULES INCORPORATED,
Plaintiff-Appellant,
v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

[Filed Jul. 7, 1994]

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on July 14, 1994.

FOR THE COURT,

FRANCIS X. GINDHART
Clerk

By /s/ Diane M. Frye
DIANE M. FRYE
Chief Deputy Clerk

Dated: July 7, 1994

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5138

WM. T. THOMPSON COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

[Filed Jul. 7, 1994]

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on July 14, 1994.

FOR THE COURT,

FRANCIS X. GINDHART
Clerk

By /s/ Diane M. Frye
DIANE M. FRYE
Chief Deputy Clerk

Dated: July 7, 1994

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5124

HERCULES INCORPORATED,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

92-5138

WM. T. THOMPSON COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims in CASE NO(S). 90-496C and 90-391C

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER
OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

DATED May 4, 1994

ISSUED AS A MANDATE: July 14, 1994